(20)

No. 03-1601
Title: City of Rancho Palos Verdes, California, et al., Petitioners
v.
Mark J. Abrams
Docketed: June 1, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-55681)
Decision Date: January 15, 2004
Rehearing Denied: March 16, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 25 2004	Petition for a writ of certiorari filed. (Response due July 1, 2004)
Jul 1 2004	Brief of respondent Mark J. Abrams in opposition filed.
Jul 1 2004	Brief amici curiae of Alabama, et al. filed.
Jul 1 2004	Brief amici curiae of National League of Cities, et al. filed.
Jul 1 2004	Brief amici curiae of Local Governments, League of California Cities, et al. filed.
Jul 13 2004	Reply of petitioners City of Rancho Palos Verdes, California, et al. filed. (Distributed)
Jul 14 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 28 2004	Petition GRANTED.
Nov 3 2004	Motion to dispense with printing the joint appendix filed by petitioners City of Rancho Palos Verdes, California, et al.
Nov 5 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Nov 9 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Nov 12 2004	SET FOR ARGUMENT Wednesday, January 19, 2005.
Nov 12 2004	Brief amici curiae of Local Governments and Related Associations filed.
Nov 12 2004	Brief amicus curiae of United States filed.
Nov 12 2004	Brief amici curiae of National League of Cities, et al. filed.
Nov 12 2004	Brief amici curiae of Alabama, et al. filed.
Nov 12 2004	Brief of petitioners City of Rancho Palos Verdes, California, et al. filed.
Nov 20 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 24 2004	CIRCULATED.
Dec 13 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 13 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 13 2004	Record received from U.S.D.C. - Central Dist. of California. (1 box)
Dec 13 2004	Brief amici curiae of Certain Individual Rancho Palos Verdes Residents, et al. filed. (Distributed)
Dec 17 2004	Brief amicus curiae of American Mobile Telecommunications Association filed. (Distributed)
Dec 17 2004	Brief of respondent Mark J. Abrams filed. (Distributed).

Dec 17 2004	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Dec 17 2004	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Dec 17 2004	Brief amicus curiae of James A. Kay, Jr. filed. (Distributed)
Dec 17 2004	Brief amicus curiae of Cellular Telecommunications & Internet Association filed. (Distributed)
Dec 18 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Jan 6 2005	Reply of petitioners City of Rancho Palos Verdes, California, et al. filed. (Distributed)
Jan 19 2005	Argued. For petitioners: Jeffrey A. Lamken, Washington, D.C.; and on behalf of the United States, as amicus curiae, James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondenet: Seth P. Waxman, Washington, D.C.

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5/25/04

IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.*, expressly preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," such as antenna towers used to provide cellular telephone service. 47 U.S.C. § 332(c)(7)(A). The Act also establishes limits on that state and local authority, requiring (among other things) that state and local decisions regulating the placement and construction of wireless service facilities be in writing, be supported by substantial evidence, not unreasonably discriminate among providers of functionally equivalent services, and not have the effect of preventing the provision of wireless telephone service. 47 U.S.C. § 332(c)(7)(B)(i), (iii). The Act further provides an express cause of action through which "[a]ny person adversely affected" by a decision alleged to be contrary to those limits may seek judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The question presented is:

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners the City of Rancho Palos Verdes (a municipality) and the City of Rancho Palos Verdes City Council were defendants-appellees in the court of appeals. Respondent Mark J. Abrams was the plaintiff-appellant in the court of appeals. Frank Lyon, John Cartwright, Thomas Long, Craig Mueller, Theodore Paulson, Donald Vannorsdall, John McTaggart, Douglas W. Stern, Lee Byrd, Barbara Ferraro, Marilyn Lyon, and Larry Clark (individual members of the City Council and the City Planning Commission) were defendants in district court.

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PETITION FOR A WRIT OF CERTIORARI

The City of Rancho Palos Verdes, California, and the City Council of the City of Rancho Palos Verdes, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 354 F.3d 1094 (9th Cir. 2004). The order and opinions of the district court (App., *infra*, 13a-15a, 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. A petition for rehearing was denied on March 16, 2004 (App., *infra*, 65a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act, 47 U.S.C. § 151 *et seq.*, and of 42 U.S.C. §§ 1983 and 1988, are set forth in the Appendix at App., *infra*, 66a-79a.

STATEMENT

This case concerns whether municipalities and state and local officials who make zoning and other land-use decisions alleged to be inconsistent with a provision of the Communications Act, 47 U.S.C. § 332(c)(7), are subject to actions for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. The Third and Seventh Circuits have answered that question in the negative, holding that the expedited judicial review expressly provided by the Communications Act, 47 U.S.C. § 332(c)(7)(B)(v), provides the appropriate remedy. In the decision below, the Ninth Circuit reached the opposite result, following a vacated decision of the Eleventh Circuit.

1. The Communications Act of 1934 ("Communications Act" or "Act"), 47 U.S.C. § 151 *et seq.*, "established a comprehensive system for the regulation of communication

by wire and radio" and "created * * * the Federal Communications Commission" to carry out the Act's underlying policies. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942). In 1996, Congress amended the Communications Act to foster greater competition and innovation in local telephone and other communication services. See Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. Of particular relevance here, the 1996 Act created a new provision—codified as 47 U.S.C. § 332(c)(7)—to address the relationship between local zoning and the siting of antennae for cellular and other wireless telephone services. 1996 Act, § 704, 110 Stat. at 151-152.

That provision, as initially drafted, "would have allowed the FCC total federal preemption of state authority to regulate tower siting." *Sprint Spectrum L.P.* v. *City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2004). Congress, however, "rejected this approach," enacting Section 332(c)(7) to "leave[] zoning authority in the hands of state and local governments," subject to specified limits. *Ibid.*; see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996) (Section 332(c)(7) "prevents [FCC] preemption * * * and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth.").

Titled "Preservation of local zoning authority," Section 332(c)(7) states that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The next paragraph establishes limits on that authority. It provides that state and local "regulation of the placement, construction, and modification of personal wireless service facilities" may neither "unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I), nor "prohibit or have the effect of prohibiting the provision of personal wireless services," 47

U.S.C. § 332(c)(7)(B)(i)(II). Further, state and local authorities must act on requests to "place, construct, or modify" wireless service facilities "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and any decision denying a request must "be in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii). States and municipalities thus retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently"; even "if a State or local government grants a permit in a commercial district," there is no requirement that it "also grant a permit for a competitor's 50-foot tower in a residential district." H.R. Conf. Rep. No. 458, *supra*, at 208.

To enforce those limits on local zoning authority, the Act provides an express cause of action for expedited judicial review, subject to a 30-day limitations period:

> Any person adversely affected by any final action or failure to act by a State or local government * * * that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v).[1]

2. This is the second lawsuit between respondent Mark J. Abrams and the City of Rancho Palos Verdes, California ("the City"), in connection with respondent's construction and commercial use of antenna towers in the yard of his single-family residence. Respondent holds numerous FCC licenses and provides two-way radio communications and other services for profit, individually and as a principal in a

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[1] The Act also prohibits state and local governments from regulating facility placement based on the "environmental effects of radio frequency emissions," so long as the facilities comply with FCC emission rules. 47 U.S.C. § 332(c)(7)(B)(iv). Persons adversely affected by violations of that prohibition may bring the action for judicial review described above or "petition the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v).

company called Mobile Relay Associates; he is also a licensed amateur (or "ham") radio operator. App., *infra*, 2a; Certified Administrative Record (Admin. Rec.) 434, 863. At all relevant times, respondent resided in the Del Cerro neighborhood of the City of Rancho Palos Verdes. Respondent's property and the surrounding neighborhood are zoned for detached, single-family residences in a low-density environment.[2]

a. Between 1989 and 1990, respondent applied for and received permission from the City's Planning Department to erect a radio antenna in the backyard of his residence, solely for amateur use. The application approved by the Planning Department showed a 30-foot tower with a 10-foot retractable mast, so that the tower would "extend to 40 [feet] and nest at 30 feet." Admin. Rec. 2; see *id.* at 14; App., *infra*, 24a. The City's Municipal Code barred the construction of any antenna taller than 40 feet unless the applicant obtained a minor exception permit, which respondent did not seek. See Rancho Palos Verdes Mun. Code § 17.04.050(B)(4), (8); Admin. Rec. 335. After the City approved the tower, respondent submitted to the City's Building and Safety Division construction plans depicting a structure with a fixed height of 52.5 feet. Admin. Rec. 50-51. Apparently unaware that the Planning Department had approved a tower with a maximum height of 40 feet, the building inspector stamped the plans as approved, *ibid.*, and respondent erected the 52.5-foot tower. See App., *infra*, 54a.[3] Despite an express condition proscribing use of the antenna tower for commercial purposes, respondent used the tower and related antennae to provide commercial radio services. *Id.* at 2a, 34a-35a.

[2] The City, population 41,000, is located on the scenic Palos Verdes peninsula, about 23 miles from downtown Los Angeles. The Del Cerro neighborhood is near the top of a ridge about two miles from the coast.

[3] The safety inspector's stamp stated that the "stamping of these plans and specifications SHALL NOT be held to permit or be an approval of the violation of any provisions of any City Ordinance or State Law." Admin. Rec. 50, 620. As a result, there was some dispute as to whether the safety inspector's final approval rendered the tower lawful despite the Municipal Code's prohibition on towers taller than 40 feet absent a special use permit. See, *e.g.*, *id.* at 169-170, 307-308, 312-313, 332.

While the City was investigating the suspected commercial uses, respondent erected another antenna tower, this time on a trailer in his yard, and extended it to a height of over 100 feet. Admin. Rec. 867-868, 1302. Respondent did not seek a permit for the new tower. Instead, he advised the City that, in his view, the tower was a "mobile" antenna not covered by the Municipal Code. Although respondent eventually lowered the tower to 75 feet, he declined to remove or fully retract it. *Id.* at 868, 966-967. The City therefore filed an action for declaratory and injunctive relief against respondent in Los Angeles County Superior Court on April 12, 1999, alleging that the antennae and their commercial use violated the City's zoning ordinance. On September 13, 1999, the Superior Court preliminarily enjoined respondent from unauthorized commercial use of the towers and required respondent to remove the trailer-mounted tower. C.A. E.R. 21-23.

b. After the Superior Court issued the injunction, respondent applied for a conditional use permit (or "CUP") to allow him to offer commercial radio services using the 52.5-foot antenna tower in his backyard. The Staff of the City's Planning Department prepared an 18-page report assessing the impact of converting the tower to commercial use; it recommended that the application be denied. Admin. Rec. 553-570; see *id.* at 878-885. After conducting two public hearings and taking written evidence, the Planning Commission adopted a resolution denying the application. App., *infra*, 54a-64a. The resolution stressed the tower's "visual[] prominen[ce] within the neighborhood" and its "negative visual impacts." *Id.* at 57a, 60a-61a. The Commission found that the commercial use of such a prominent structure would be inconsistent with the purpose and character of the neighborhood, as well as the City's Antenna Development Guidelines, which encourage the placement of commercial antennae "in non-single family

residential areas." *Id.* at 59a, 60a. Finally, the Commission addressed the Communications Act, finding its decision consistent with each of the Act's requirements. *Id.* at 61a-63a.

Respondent appealed to the City Council. After additional public hearings, the Council adopted a resolution upholding the Planning Commission's decision. App., *infra*, 34a-53a. Like the Planning Commission, the City Council concluded that the proposed use was inconsistent with the neighborhood's zoning under the City's General Plan, which designated it for detached, single-family residences. That designation permits "accessory" structures, *i.e.*, structures closely linked, incidental, and subordinate to the property's use as a single-family residence. The Council found that the proposed commercial use was neither incidental nor subordinate to the property's primary use as a residence. *Id.* at 43a.

The City Council noted that, when the City initially authorized respondent to build the antenna tower, respondent had "expressly agreed" that it "was not to exceed forty feet in height" and was "not to be used for commercial purposes." App., *infra*, 39a-40a. "Notwithstanding those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet," *id.* at 40a, and respondent used it for commercial purposes, *id.* at 34a-35a. "[I]t appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet," the Council also found, "was to accommodate the commercial use[s]." *Id.* at 40a-41a.

The Council found that the resulting structure and antenna array were "highly visible" and caused adverse "visual and aesthetic impacts" on the surrounding properties and neighborhood. App., *infra*, 46a, 48a. Because of the tower's location and the size of respondent's lot, the City Council found that the adverse visual impact could not be addressed except by modifying the tower's height, location, or configuration. *Id.* at 38a-39a. Respondent, however, advised the Council "that he would not consider any alteration or reduc-

tion of the height, size, configuration or location of the existing tower." *Id.* at 39a; see *id.* at 41a, 46a-47a.

The City Council conceded that permitting commercial use of the tower would not, by itself, alter the tower's visual impact. But the Council found that commercial use of the 52.5-foot tower would "perpetuate [its] existing adverse visual impacts." App., *infra*, 41a.[4] Echoing the Planning Commission's concerns, see *id.* at 51a, 60a, the Council also found that "the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects," *id.* at 41a. "Such proposals are likely," the Council observed, "given the neighborhood's elevation * * * and unique geographic setting." *Ibid.*

Finally, the City Council found that its decision was consistent with 47 U.S.C. § 332(c)(7). There was no discrimination among service providers because the denial rested on the "adverse visual and aesthetic impacts" of the tower and respondent's refusal to mitigate those effects. App., *infra*, 48a. Nor did the denial prohibit the provision of wireless services. *Ibid.* The City's expert "demonstrated that there is

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[4] Although the Council did not explain the finding of "perpetuation," the Council appears to have been concerned that granting the permit would accord the 52.5-foot tower, which at that time was of questionable legality, permanent status as a lawful structure. See p. 4 n.3, *supra*; App., *infra*, 24a n.5 (addressing the City's claim that, after denying the permit, it might require that the tower be reduced in height or removed). In addition, so long as the tower was used solely to support a resident's hobby, it could be seen as a transitory structure that would be removed when the resident moved or gave up the hobby. Converting it to commercial use, in contrast, could create business reliance and afford the tower greater permanence. See *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77, 83, 85 (D. Me. 2001) (noting opposition to conversion of amateur radio tower to commercial use because of the expectation that the tower would otherwise be removed when the amateur radio operator stopped using it as well as reluctance to issue a permit "confer[ring] permanent status to a tower they believe[d] to be temporary").

at least one alternative site in the City" where respondent's "ability to transmit would be increased above the level of coverage" obtained from his home "if an eighty-foot support structure were constructed." *Id.* at 45a. The City Council further found that respondent could overcome coverage problems by applying a different technology to broadcast from two or more smaller antennae at different sites. *Id.* at 47a, 49a-50a. Finally, the City noted that many companies were providing wireless service throughout the City "from facilities that are not causing" such "adverse visual and aesthetic impacts." *Id.* at 49a.

3. Respondent then filed a lawsuit in federal district court, alleging that the City violated 47 U.S.C. § 332(c)(7) by denying him a conditional use permit. Respondent asserted that the City's decision unreasonably discriminated among wireless providers, prohibited the provision of personal wireless service, and was not supported by substantial evidence. Pursuant to 47 U.S.C. § 332(c)(7)(B)(v), respondent sought an injunction requiring the City to issue a permit allowing commercial use of the tower. Respondent also sought damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, asserting that the City had violated his rights under the Communications Act. C.A. E.R. 14, 18. The district court initially stayed that action in light of the City's suit in Los Angeles Superior Court, but lifted the stay after the Superior Court entered judgment for the City in May 2001.

Following trial on a stipulated administrative record, the district court ruled for respondent, holding that the City's decision was not supported by "substantial evidence" as required by 47 U.S.C. § 332(c)(7)(B)(iii). App., *infra*, 16a-33a. The City's concern about the tower's visual impact, the district court held, was insufficient to justify denying the permit because the "antenna is already in existence, and thus there is no further aesthetic impact created by [respondent's] proposed use." *Id.* at 23a. The district court also rejected the City's argument that permitting commercial use would

contradict the "original intention of the 1990 permit" and "lead to the proliferation of more antennas," labeling the former rationale "immaterial," *id.* at 24a, and the latter "unfounded," *id.* at 25a. Other antenna applications might follow, but the City would not be required to grant permits that raise concerns such as "an increase in visual blight." *Ibid.*

The district court declined to resolve respondent's claim that the City had unreasonably discriminated among providers of functionally equivalent services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). App., *infra*, 29a-30a & n.8. The court, however, rejected respondent's claim that the City had precluded the provision of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). App., *infra*, 30a-32a. Other providers had successfully operated in the City consistent with municipal requirements, and there was at least one alternative site for respondent's antenna. *Id.* at 31a-32a.

The court ordered additional briefing and argument on appropriate remedies, finding that 47 U.S.C. § 332(c)(7)(B)(v) afforded it "broad authority" to fashion "an appropriate remedy that would bring expedited relief." App., *infra*, 32a. Following briefing and argument, the court entered an order vacating the City's denial of respondent's application, remanding the matter to the City, and enjoining the City to grant the application subject to reasonable conditions. *Id.* at 13a-15a. The district court denied respondent's "request for damages under 42 U.S.C. § 1983" and his corresponding request for "attorney's fees under 42 U.S.C. § 1988." App., *infra*, 15a. The remedies for violations of the Communications Act, the court stated, "are subsumed" within the Act's review provisions, and "damages pursuant to 42 U.S.C. § 1983 are not available." App., *infra*, at 14a.

4. Respondent appealed the district court's denial of damages and fees under 42 U.S.C. §§ 1983 and 1988, and the Ninth Circuit reversed. App., *infra*, 1a-12a (T.G. Nelson, joined by Kozinski, J., and the Hon. Jane A. Restani, U.S. Ct. of Int'l Trade, by designation). The Ninth Circuit acknowl-

edged that, under cases such as *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981), a party cannot use Section 1983 to challenge the violation of a federal statute if that statute establishes a "comprehensive" remedial scheme that is incompatible with Section 1983 remedies. App., *infra*, 4a. The Ninth Circuit also agreed that the Communications Act, through 47 U.S.C. § 332(c)(7)(B)(v), creates a "private right of action" for "expedited judicial review," subject to "a short statute of limitations (30 days)." App., *infra*, 5a-6a. But the Ninth Circuit held that the Communications Act's remedial scheme is not sufficient to "close the door on § 1983 liability" because, according to that court, it "does not provide for any type of relief" and "contain[s] no remedies at all." *Id.* at 6a, 7a-8a.

In so holding, the Ninth Circuit rejected the Third Circuit's contrary conclusion in *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687 (2002), labeling that decision "flawed." App., *infra*, 8a.[5] The Ninth Circuit first faulted *Nextel*'s conclusion that the expedited right of action created by 47 U.S.C. § 332(c)(7)(B)(v) is "remedial." App., *infra*, 8a. The short limitations period, the Ninth Circuit stated, "can hardly" be considered remedial, since it "imposes a burden on an aggrieved plaintiff, not a benefit." *Ibid.* Similarly, the Ninth Circuit declared that expedited judicial review "does nothing to remedy" a Communications Act "violation in itself." *Id.* at 8a-9a; see *id.* at 9a (1996 Act "contains no remedial provisions"). Accordingly, the Ninth Circuit deemed relief under the Communications Act to be insufficiently beneficial to plaintiffs to be considered "comprehensive," since "[t]he only benefit to an aggrieved plaintiff is expedited judicial review." *Id.* at 8a.

[5] After this case was briefed and argued in the Ninth Circuit, the Seventh Circuit joined the Third Circuit in holding that Section 1983 and 1988 remedies are unavailable. See *Primeco Personal Communications Ltd. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003). Although the parties brought that decision to the Ninth Circuit's attention before the Ninth Circuit issued its decision, the Ninth Circuit's opinion does not mention the Seventh Circuit's ruling.

The Ninth Circuit dismissed the Third Circuit's concern that allowing Section 1983 suits under the four-year limitations period presumably applicable to such actions would undermine the 30-day limitations period imposed by 47 U.S.C. § 332(c)(7)(B)(v). App., *infra*, 8a (citing *Nextel*, 286 F.3d at 695). "Congress can limit the time in which a plaintiff can file," the Ninth Circuit stated, "without inadvertently limiting the plaintiff's remedies at the same time." *Id.* at 9a.

Finally, the Ninth Circuit relied on the savings clause in Section 601(c)(1) of the 1996 Act, codified as 47 U.S.C. § 152 (note). App., *infra*, 10a-11a. That provision states that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided." *Id.* at 10a. The Ninth Circuit stated that deeming the rights created by the Communications Act to be enforceable solely through that Act's judicial review provisions would "impair" Section 1983. *Ibid.* The Ninth Circuit conceded that this Court had rejected a similar argument in *Sea Clammers*, 453 U.S. at 15-16, but distinguished the savings clauses in *Sea Clammers* as preserving federal "rights" rather than federal "laws."

Accordingly, the Ninth Circuit held that "Section 1983 remedies are available" and that "the district court should award § 1983 damages" in this case. App., *infra*, 2a, 12a. On March 16, 2004, the Ninth Circuit denied rehearing and rehearing en banc. *Id.* at 65a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case holds that local governments that make zoning and land-use decisions alleged to be inconsistent with 47 U.S.C. § 332(c)(7)—a Communications Act provision entitled "Preservation of local zoning authority"—may be sued for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. That holding squarely

conflicts with decisions of the Third and Seventh Circuits. The Ninth Circuit's decision, moreover, eviscerates this Court's decision in *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and effectively overturns the balance between obligations and remedies Congress struck in the Communications Act. Throughout that Act, Congress both identifies the relevant regulatory obligations and specifies the means for their vindication. Here, for example, the Act couples the limits on state and local zoning authority imposed by Section 332(c)(7)(B) with an express mechanism for private enforcement—a cause of action for expedited judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The Ninth Circuit, however, dismissed that express cause of action as providing "no remedies at all," and superimposed over it the broad damages and attorney's fees relief (and associated four-year limitations period) of Sections 1983 and 1988. The resulting distortion portends serious and immediate consequences for local governments. Cases alleging violations of Section 332(c)(7) are proliferating in the lower federal courts. Under the Ninth Circuit's decision, local governments now must choose between potentially massive monetary liability from even good-faith decisions to deny or limit antenna-tower construction requests, and the enduring consequences of inappropriately sited towers.

I. The Courts Of Appeals Are Divided On The Availability Of Section 1983 Damages And Section 1988 Fees For Communications Act Violations

When Congress added 47 U.S.C. § 332(c)(7) to the Communications Act in 1996, see Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 704, 110 Stat. at 151-152, it explicitly preserved state and local zoning authority over the siting and construction of antenna towers and other facilities used to provide wireless telephone service. 47 U.S.C. § 332(c)(7)(A). At the same time, Congress limited that authority by, among other things, requiring decisions that

deny authorization for wireless facilities to be supported by substantial evidence, and by providing that such decisions may neither unreasonably discriminate among providers of functionally equivalent services nor have the effect of foreclosing wireless service. See 47 U.S.C. § 332(c)(7)(B)(i), (iii); pp. 2-3, *supra*. Consistent with the 1996 Act's objective of preserving local zoning authority while encouraging the rapid deployment of wireless services, Congress paired those provisions with an express, but carefully circumscribed, private enforcement mechanism. In particular, Section 332(c)(7)(B)(v) authorizes an aggrieved party to seek expedited judicial review of an adverse zoning or permit decision within 30 days. The question in this case is whether such challenges may also be asserted as actions for damages and attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988.

Section 1983 creates a cause of action for the violation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, while Section 1988(b) entitles successful Section 1983 plaintiffs to attorney's fees. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983). In 1980, this Court concluded that the cause of action created by Section 1983 and associated remedies under Section 1988 are available not only for violations of constitutional rights, but also for violations of certain federal statutory rights. *Maine* v. *Thiboutot*, 448 U.S. 1, 12-13. The Court has since clarified that, "to seek redress through § 1983 * * * a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002) (statute must create rights in plaintiff and not merely limit actions of defendant). In addition, Section 1983 damages and Section 1988 fees are not available where Congress has provided a comprehensive remedial scheme in the federal statute allegedly violated. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate

congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20. Likewise, if "allowing § 1983 actions * * * 'would be inconsistent with Congress' carefully tailored scheme,'" relief is limited to that provided in the underlying statute. *Blessing*, 520 U.S. at 346.

Applying that framework to the Communications Act, the Third and Seventh Circuits have held that challenges to land-use decisions alleged to be inconsistent with 47 U.S.C. § 332(c)(7) may not be brought under Section 1983. *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (2002) (Alito, J., joined by Becker, C.J., and Barry, J.); *Primeco Personal Communications Ltd. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003) (Posner, J., joined by Kanne & Rovner, JJ.) (*Verizon Wireless*). The Ninth Circuit reached the opposite conclusion below, holding that "Section 1983 remedies are available." App., *infra*, 2a. In a decision that was later vacated, the Eleventh Circuit also concluded that Communications Act violations may be asserted under Section 1983. *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir.) (Wilson, J., joined by Carnes & Barkett, JJ.), *vacated on reh'g en banc*, 260 F.3d 1320, *dismissed on settlement*, 264 F.3d 1314 (2001).

A. In the Third Circuit's *Nextel* case, a wireless service provider sought to "build a 150 foot 'monopole' tower * * * in Kingston Township," Pennsylvania. 286 F.3d at 689. Nextel sued the Township, alleging that it had prohibited the provision of wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(ii). After concluding that those claims were not properly before it under the expedited review provision of the Communications Act, 47 U.S.C. § 332(c)(7)(B)(v),[6] the Third Circuit held that Nextel could not press the same

[6] The court held that the Township's failure to issue a permit was not subject to review under Section 332(c)(7)(B)(v) because Nextel had "never filed" a permit request. 286 F.3d at 692. The court held that Nextel's related demand for an injunction against a Township ordinance became moot when the ordinance was amended. *Id.* at 693.

alleged Communications Act violations through a damages action under Section 1983. See 286 F.3d at 693-695.

The Third Circuit observed that 47 U.S.C. § 332(c)(7)(B)(v) creates an express cause of action to redress Nextel's claims. That provision permits persons aggrieved by violations of the Communication Act's tower-siting provisions to "file an action in any court of competent jurisdiction"; requires that "such an action be filed within a very short period—30 days"; and "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Nextel*, 286 F.3d at 694-695. "While the remedial scheme * * * is not complicated," the Third Circuit explained, "it is comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* at 694. The expedited review provision benefits plaintiffs by "provid[ing] speedy redress for violations of the Act." *Id.* at 695. The rapid review ensured by the combination of a 30-day filing deadline and mandatory expedition, moreover, limits any damage from erroneous municipal decisions. *Ibid.* The court also found it "significant" that Section 332(c)(7)(B)(v) "makes no provision for attorney's fees." *Id.* at 695.

Relying on those considerations, the Third Circuit also concluded that "[a]llowing plaintiffs to assert" Communications Act claims "under § 1983 would upset th[e] balance" that Congress established in the 1996 Act:

> A plaintiff would be freed of the short 30-day limitations period and would instead presumably have four years to commence the action. See 28 U.S.C. § 1658. The court would also presumably be freed of the obligation to hear the claim on an expedited basis. Perhaps most importantly, attorney's fees would be available.

286 F.3d at 694-695. The availability of attorney's fees would be particularly perverse, the Third Circuit stated, because Communications Act "plaintiffs are often large cor-

porations or affiliated entities, whereas [the] defendants are often small, rural municipalities." *Id.* at 695.

The Third Circuit explained that Section 332(c)(7) parallels the provisions this Court found sufficiently comprehensive to foreclose Section 1983 relief in *Sea Clammers* and *Smith* v. *Robinson*, 468 U.S. 992 (1984). Like Section 332(c)(7) here, the statutes in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Nextel*, 286 F.3d at 694 (quoting *Wright* v. *Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427 (1987)). Conversely, the Third Circuit observed that Section 332(c)(7) differs from the provisions this Court found not to be comprehensive in *Blessing* and *Wright*, because the statutes in those cases, unlike Section 332(c)(7), provided no private judicial action to enforce statutory requirements. *Nextel*, 286 F.3d at 694-695.

Finally, the Third Circuit rejected the argument that a savings provision in the 1996 Act compelled the contrary result. That provision declares that "this Act * * * shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." 47 U.S.C. § 152 (note). The Third Circuit observed: "We do not hold that enactment of the [1996 Act] had any effect on § 1983; we simply hold that the [1996 Act] itself did not create a right that can be asserted under § 1983 in lieu of the [1996 Act's] own remedial scheme." *Nextel*, 286 F.3d at 696.

B. In *Verizon Wireless*, *supra*, the Seventh Circuit reached the same result. In that case, the City of Mequon, Wisconsin, rejected Verizon's application to build a 70-foot antenna in a church yard. Although the Seventh Circuit concluded that the City of Mequon had violated 47 U.S.C. § 332(c)(7)(B)(iii)'s requirement that decisions be supported by "substantial evidence," the court rejected Verizon's claim for attorney's fees: "42 U.S.C. § 1983, which drags section 1988 in its wake, should not be fastened, barnacle-like, by judicial *Diktat*, to

this new federal statute that creates rights overlapped by the existing remedial statutes." 352 F.3d at 1153.

Section 1983, the Seventh Circuit also observed, was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers." *Verizon Wireless*, 352 F.3d at 1152. In contrast, Communications Act suits are most often brought by companies with "the wherewithal to finance their own litigation without the boost given by fee-shifting statutes" and are often brought against "small towns, such as Mequon, population 21,000." *Ibid.*

C. In direct conflict with the Third and Seventh Circuits, the Ninth Circuit has now held that "Section 1983 remedies are available" for violations of 47 U.S.C. § 332(c)(7) "because the [Communications Act] does not contain a comprehensive remedial scheme." App., *infra*, 2a. The Ninth Circuit acknowledged that 47 U.S.C. § 332(c)(7)(B)(v) expressly "provides for a private right of action" "through which a plaintiff can redress [Communications Act] violations." App., *infra*, 5a-6a. But the Ninth Circuit dismissed that regime, characterizing it as "contain[ing] *procedural*, rather than *remedial*, provisions." App., *infra*, 9a. Acknowledging the circuit conflict it was creating, the Ninth Circuit declared: "[W]e depart from the Third Circuit and hold that Congress did not impliedly foreclose § 1983's remedial provisions." *Id.* at 9a; see p.10 n.5, *supra*.

The Ninth Circuit also rejected the reasoning that led the Third and Seventh Circuits to reach the opposite result. While the Third and Seventh Circuits agreed that the Communications Act cause of action for expedited judicial review, 47 U.S.C. § 332(c)(7)(B)(v), is remedial, see *Nextel*, 286 F.3d at 694; *Verizon Wireless*, 352 F.3d at 1152-1153, the Ninth Circuit deemed that cause of action insufficiently beneficial to plaintiffs to qualify as "remedial." App., *infra*, 6a. The cause of action is "hollow," the Ninth Circuit stated, because "[t]he only benefit to an aggrieved plaintiff is expedited

judicial review." App., *infra*, 8a. "[A]n expedited decision does nothing to remedy a [Communications Act] violation in itself," the court added. *Id.* at 8a-9a; see *id.* at 8a (The "provisions are not remedial."). Similarly, the Ninth Circuit declined to consider the 30-day limitations period in Section 332(c)(7)(B)(v) when addressing comprehensiveness. "Shortening the limitations period to thirty days imposes a burden on an aggrieved plaintiff, not a benefit." *Id.* at 8a.

The Ninth Circuit also rejected the Third Circuit's conclusion that Section 1983 remedies are incompatible with—and would upset the balance established by—Section 332(c)(7)'s remedial scheme. In *Nextel*, the Third Circuit held that allowing Section 1983 actions to proceed under a four-year limitations period would be inconsistent with the express 30-day limit provided by 47 U.S.C. § 332(c)(7)(B)(v). See 286 F.3d at 694-695. In this case, by contrast, the Ninth Circuit held that those limitations periods are "compatible" because a plaintiff could (if it chose to) comply with both. App., *infra*, 9a. Furthermore, unlike the Third and Seventh Circuits, the Ninth Circuit saw no problem with awarding attorney's fees under Section 1988 for Communications Act violations despite Congress's failure to authorize that remedy in the Communications Act itself. *Verizon Wireless*, 352 F.3d at 1152-1153; see *Nextel*, 286 F.3d at 694.

Those disagreements reflect not only divergent understandings of the Communications Act, but also a deeper conflict over this Court's *Sea Clammers* decision and its progeny. The Third Circuit and other courts have observed that one critical distinction between the remedial schemes this Court has found sufficiently "comprehensive" to foreclose Section 1983 relief, and those the Court has found insufficient, is that the former provide a private right of action for judicial enforcement. See p. 16, *supra*; *Kendall* v. *City of Chesapeake*, 174 F.3d 437, 440-443 (4th Cir. 1999) ("[T]he Supreme Court has repeatedly emphasized that the availability of" private judicial remedies "strongly suggests a Congressional intent to preclude resort to § 1983."). Likewise, the Third Circuit concluded that Congress's decision to limit a statutory right of action (whether through a short limitations period or restrictions on available relief) may demonstrate an intent to foreclose the more capacious remedies of Sections 1983 and 1988. See *Nextel*, 286 F.3d at 694-695. Here, the Ninth Circuit drew precisely the opposite inference, holding that Congress's decision to limit relief under an express cause of action (such as through "the lack of any damages" remedy) is "evidence that Congress * * * intended to preserve an aggrieved plaintiff's right to invoke § 1983." App., *infra*, 7a.

Finally, the Ninth Circuit's construction of the 1996 Act's savings clause, 47 U.S.C. § 152 (note), is flatly inconsistent with the Third Circuit's construction. The Ninth Circuit held that Congress, in directing that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, state, or local law" except as expressly provided, had "actually affirmed its * * * intent" to make Section 1983 remedies available. App., *infra*, 10a. In so holding, the Ninth Circuit followed the Eleventh Circuit's vacated decision in *AT&T Wireless PCS, Inc.*, 210 F.3d at 1328-1330. The Third Circuit's decision in *Nextel* expressly "disagree[d] with the reasoning of that decision," holding that the unavailability of Section 1983 relief for Communications Act violations does not "impair" Section 1983. 286 F.3d at 695. It merely recognizes that Congress, in amending the Communications Act in 1996, declined to modify Section 1983's scope by creating *additional* rights that can be asserted under it. *Id.* at 696.

D. The same conflict pervades the decisions of the federal district courts as well. In case after case, district courts have agreed with the Third and Seventh Circuits, holding that Section 1983 damages and Section 1988 fees are not available for violations of 47 U.S.C. § 332(c)(7). See, *e.g.*, *Nextel Communications, Inc.* v. *Town of Randolph*, 193 F. Supp. 2d 311, 322 (D. Mass. 2002); *National Telecomm. Advisors, Inc.* v. *City of Chicopee*, 16 F. Supp. 2d 117, 122-123 (D. Mass.

1998); *CIS Communications L.L.C.* v. *County of Jefferson, Missouri*, 222 F. Supp. 2d 1148, 1150 (E.D. Mo. 2002); *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77, 94 (D. Me. 2001); *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 50 F. Supp. 2d 1352, 1362 (N.D. Ga. 1999).

In case after case, other district courts have reached the opposite result. *Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187, 1199 (W.D.N.Y. 2003); *Omnipoint* v. *Town of Westford*, 206 F. Supp. 2d 166, 173-174 (D. Mass. 2002); *APT Minneapolis Inc.* v. *Stillwater Township*, 2001 WL 1640069, at *14 (D. Minn. June 22, 2001); *SBA Communications, Inc.* v. *Town of Brookfield*, 96 F. Supp. 2d 139, 142 (D. Conn. 2000); *Smart SMR of N.Y., Inc.* v. *Zoning Comm'n of the Town of Stratford*, 995 F. Supp. 52, 61 (D. Conn. 1998); *Cellco Partnership* v. *Town Plan and Zoning Comm'n of the Town of Farmington*, 3 F. Supp. 2d 178, 186 (D. Conn. 1998); *Sprint Spectrum, L.P.* v. *Town of Easton*, 982 F. Supp. 47, 53 (D. Mass. 1997). This Court's intervention is necessary to resolve this pervasive conflict among the circuits and the district courts.

II. The Ninth Circuit's Decision Departs From This Court's Precedents And Disrupts The Careful Balance Established By The Communications Act

Under *Sea Clammers*, Congress's provision of a comprehensive remedial regime for vindicating statutory interests may "demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20. In assessing the remedial regime, "[t]he crucial consideration is what Congress intended," as indicated by the statute's text, structure, and purpose. *Smith* v. *Robinson*, 468 U.S. at 1012. In this case, those indicia demonstrate that Congress "provided precisely the remedies it considered appropriate." 453 U.S. at 14. Only by inverting this Court's precedents did the Ninth Circuit reach the contrary conclusion.

A. It is undisputed that the Communications Act provides an express, expedited cause of action "through which a plaintiff can redress * * * violations" of Section 332(c)(7)'s requirements. App., *infra*, 5a-6a (citing 47 U.S.C. § 332(c)(7)(B)(v)). That fact alone suggests an intent to displace Section 1983 remedies. As this Court observed, the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427. The Communications Act does likewise here.

The cause of action created by Section 332(c)(7)(B)(v), moreover, forms part of the Communication Act's comprehensive regulatory regime. In provision after provision of the Act, Congress specified both the legal duty imposed and the appropriate governmental and private remedies. See, *e.g.*, 47 U.S.C. § 202(c) (penalty for common carriers' unjust or unreasonable discrimination in charges and practices); 47 U.S.C. § 203(e) (penalty for tariff violations); 47 U.S.C. § 205 (penalty for violation of rate orders); 47 U.S.C. §§ 206-207 (private action for damages and attorney's fees for persons injured by common carrier violations of Chapter 2); 47 U.S.C. § 227(b)(1)(C), (3) (prohibition on certain uses of telephone, with private action for injunctive relief, actual damages, statutory damages, and treble damages in specified circumstances); 47 U.S.C. § 231 (fines and civil penalties, but no private action, for violations of internet minor-access restrictions); 47 U.S.C. § 605(e)(3) (private action for unlawful interception of communications, including injunctions, damages computed under statutory criteria, and "reasonable attorneys' fees"). The 1996 amendments to the Act follow the same deliberate pattern. See, *e.g.*, 47 U.S.C. § 258 (prohibiting changes to telephone service provider absent verification procedures and providing damages to the disconnected carrier "in an amount equal to all charges paid by such subscriber after such violation"); 47 U.S.C. § 274 (authorizing damages action or complaint to the Commission for violations of electronic publishing restrictions).

As this Court recognized in *Sea Clammers*, the presence of such an "elaborate" enforcement regime indicates that Congress "provided precisely the remedies it considered appropriate" and "supplant[ed] any remedy that otherwise would be available under § 1983." 453 U.S. at 14-15, 20-21. Simply put, where Congress intended to award relief such as attorney's fees for Communications Act violations, Congress provided that relief in the Communications Act itself.

B. To reach the opposite result, the Ninth Circuit declared that Section 332(c)(7)(B)(v) is not even "remedial" under *Sea Clammers* because, according to that court, it "does not provide for any type of relief." App., *infra*, 7a, 8a; see *id.* at 7a (Act "contains no remedies at all."); *id.* at 9a ("no remedial provisions"); *ibid.* ("[T]he statute grants no remedies beyond procedural rights."). The notion that Congress, in enacting Section 332(c)(7)(B)(v), established a cause of action that affords successful plaintiffs "no remedies at all" borders on the absurd. Congress designed that provision to "provide[] a mechanism for *judicial relief*." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996) (emphasis added). Every other court to have considered the matter has concluded that 47 U.S.C. § 332(c)(7)(B)(v) does authorize remedies, including (at a minimum) injunctive relief. *Nextel*, 286 F.3d at 695 & n.6 (citing district court cases). To be sure, Section 332(c)(7)(B)(v) does not *enumerate* the available remedies. However, as this Court explained in *Franklin* v. *Gwinnett County Public Schools*, federal courts adjudicating claims under statutes that create a cause of action but are silent about remedies are presumed to "have the power to award any appropriate relief." 503 U.S. 60, 70-71 (1992); see *Nextel*, 286 F.3d at 695 n.6. The Ninth Circuit offered no reason for departing from that holding.

Perhaps recognizing as much, the Ninth Circuit declared that Congress, by limiting the express private remedies in the Communications Act, somehow demonstrated its intent to preserve the more capacious remedies of Section 1983.

"[T]he lack of any damages" under the Communications Act, the Ninth Circuit thus stated, is evidence "that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." App., *infra*, 7a. That strained reasoning defies *Sea Clammers*, which held that Section 1983 remedies were unavailable there despite the absence of statutory damages relief. 453 U.S. at 14, 17; App., *infra*, 7a-8a.

The Ninth Circuit's reasoning, in fact, turns *Sea Clammers* and its progeny on their heads. Those cases recognize that Congress's decision to impose limits on express statutory remedies, far from evidencing an intent to preserve Section 1983 remedies, ordinarily precludes efforts to circumvent the limits through suit under Section 1983:

> [W]hen "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."

453 U.S. at 20 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)). As the Court observed in *Smith* v. *Robinson*, *Sea Clammers* supports the "proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of Section 1983." 468 U.S. at 1003; see *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1978) (holding that Title VII violations cannot be asserted under 42 U.S.C. § 1985 because, among other things, the otherwise "short and precise time limitations of Title VII would be grossly altered"); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 74-75 (1996) (statutory scheme with "modest set of sanctions" evinces intent to foreclose alternative cause of action that "would expose th[e] official to the full remedial powers of a federal court."). Under the Ninth Circuit's twisted logic, Congress's decision *not* to provide a

damages remedy in an underlying statute evidences Congress's intent to provide *both* damages and attorney's fees.

C. In this case, moreover, the Ninth Circuit's decision to engraft Section 1983's remedial apparatus onto Section 332(c)(7) permits the sort of procedural bypass this Court has prohibited. The Communications Act provides a streamlined procedure for resolving wireless facility siting disputes, combining a relatively short 30-day limitations period with expedited judicial review. That streamlined review serves the 1996 Act's goal of ensuring "rapid deployment of new telecommunications technologies," and minimizing delays that might otherwise harm the public interest. 1996 Act, 110 Stat. 56. The Ninth Circuit's decision to allow tower-siting claims to be asserted under Section 1983—without required expedition and subject to a four-year limitations period, see 28 U.S.C. § 1658; *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1845 (2004)—fatally undermines that carefully crafted scheme. As the Third Circuit observed, allowing suit under Section 1983 would "free" plaintiffs "of the short 30-day limitations period," offering them "four years to commence the action" while accumulating damages at public expense. 286 F.3d at 695. It would "free" the courts "of the obligation to hear the claim on an expedited basis." *Ibid.* And it would make "attorney's fees * * * available," even though Congress did not provide such relief in the Communications Act. *Ibid.*

The Ninth Circuit's conclusion that Congress intended to impose the heavy sanctions of damages and attorney's fees on municipalities for their zoning decisions is also contrary to Section 332(c)(7)'s title, "Preservation of local zoning authority." That conclusion, moreover, is at odds with the Communications Act's establishment of a broad right of action for "adversely affected person[s]," its short limitations period, and mandatory expedition, features that evidence Congress's desire to promote the public interest by balancing the Act's dual objectives of rapid deployment of wireless technology

and the preservation of local authority. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942) (provision allowing suit by "adversely affected" persons affords private litigants standing "as representatives of the public interest"). By enacting Section 332(c)(7), Congress interjected federal law into an area—zoning—that is the traditional domain of state and local governments. If Congress had meant to impose expansive financial liability in that sensitive area, it would have so provided expressly.

D. Finally, the Ninth Circuit's analysis of the savings provision of the 1996 Act, App., *infra*, 10a, exhibits a similar disregard for this Court's *Sea Clammers* decision. As the Ninth Circuit recognized, *Sea Clammers* rejected a virtually indistinguishable construction of similar language. See App., *infra*, 11a-12a; 453 U.S. at 15-16. The statutory provisions at issue there preserved the right under "any statute or common law to seek enforcement * * * or to seek any other relief." 453 U.S. at 7 nn.10 & 11; App., *infra*, 11a. This Court held that those savings clauses preserved the right to enforce the substantive rights created by other statutes, but not the right to enforce, via Section 1983, rights created by the statute containing the savings clause. 453 U.S. at 14-15.

Attempting to distinguish that decision, the Ninth Circuit urged that the 1996 Act's savings provision is broader than those at issue in *Sea Clammers* because the former "forbids the impairment of any federal 'law,'" while the latter prevented the impairment of "any 'right.'" App., *infra*, 12a. It is difficult to see how that distinction could make a difference. The savings clauses at issue in *Sea Clammers* preserved the right, under other statutes, "to seek enforcement" or "relief." If that reservation did not "save" the right to seek enforcement or relief under Section 1983, the rule against implied "impairment" of other "laws" in the Communications Act does not either. Besides, Congress did not "impair" Section 1983 by declining to make provisions added by the 1996 Act actionable under it. Congress simply

declined to expand Section 1983's sweep to include a new class of cases. See p. 16, *supra*.

III. This Case Presents A Recurring Issue Of National Importance

Whether Section 1983 damages and thus Section 1988 fees are available for Communications Act violations is a recurring question of pressing importance. Myriad courts have addressed that issue already, see pp. 19-20, *supra*, and the torrent of cases alleging violations of 47 U.S.C. § 332(c)(7) ensures that the issue will persist, particularly now that the Ninth Circuit has held that damages and fees under Sections 1983 and 1988 are available.

"The federal courts now routinely hear cases brought under the [Communications Act] by those who wish to construct cellular antenna towers and have been denied permission to do so * * *." *National Tower, LLC* v. *Plainville Zoning Board of Appeals*, 297 F.3d 14, 17 (1st Cir. 2002); see S. Martin, *Communications Tower Sitings*, 12 Berk. Tech. L.J. 483, 484 (1997) (Section 332(c)(7) "continues to create rancor and litigation."). The subject is "well traversed," *Omnipoint Holdings*, 206 F. Supp. 2d at 167, and the federal courts are awash with Section 332(c)(7) disputes.[7]

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[7] See, *e.g.*, *Nextel Communications* v. *Town of Hansen*, 2004 WL 626556 (D. Mass. Mar. 26, 2004); *APT Minneapolis Inc.* v. *City of Maplewood*, 1998 WL 634224 (D. Minn. Aug. 12, 1998); *Century Cellunet, Inc.* v. *City of Ferrysburg*, 993 F. Supp. 1072 (W.D. Mich. 1997); *Primeco PCS v. Lake County*, 1998 WL 565036 (M.D. Fla. July 20, 1998); *Sprint Spectrum L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997); *BellSouth Mobility, Inc.* v. *Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996); *AT&T Wireless Servs.* v. *Orange County*, 982 F. Supp. 856 (M.D. Fla. 1997); *Omnipoint* v. *Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000); *National Tower LLC* v. *Frey*, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd* 297 F.3d 14 (1st Cir. 2002); *Cellular Tel. Co.* v. *Zoning Bd. of the Borough of Ho-Ho-Kus*, 24 F. Supp. 2d 359 (D.N.J. 1998), *aff'd in part, rev'd in part*, 197 F.3d 64 (3d Cir. 1999); *Virginia Metronet, Inc.* v. *Board of Supervisors of James County*, 984 F. Supp. 966 (E.D. Va. 1998); *Omnipoint Corp.* v. *Zoning Hearing Bd. of Pine Grove Township*, 20 F. Supp. 2d 875 (E.D. Pa. 1998), *aff'd* 181 F.3d 403 (3d Cir. 1999); *Illinois RSA No. 3* v. *County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997); *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *Town of Amherst* v. *Omnipoint Enterps., Inc.*, 173 F.3d 9 (1st Cir. 1999); *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Sprint Spectrum L.P.* v. *City of Carmel*, 361 F.3d 998 (7th Cir. 2004).

That proliferation of cases is likely to continue unabated, for at least three reasons. First, geographic expansion of the Nation's wireless networks, the entry of new providers, and increasing wireless telephone usage, all ensure a steady demand for new antenna towers and related facilities, even in areas already served by numerous providers. See J. Van, *Wireless Phones Try to Connect in High Places*, Chicago Tribune, Jan. 17, 2004 (*avail.* 2004 WL 65042704). Second, the low threshold for claiming a violation of 47 U.S.C. § 332(c)(7) ensures that many antenna tower siting disputes will end up in court. Section 332(c)(7) makes zoning decisions that were once primarily a matter of state law subject to challenge under a panoply of federal standards: decisions may not "unreasonably discriminate" among service providers, 47 U.S.C. § 332(c)(7)(B)(i)(I); cannot "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(II); must be issued within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); must be "in writing and supported by substantial evidence," 47 U.S.C. § 332(c)(7)(B)(iii); and may not consider "the environmental effects of radio frequency emissions," 47 U.S.C. § 332(c)(7)(B)(iv). Consequently, virtually every antenna siting decision has the potential to become, quite literally, a federal case.

Third, even apart from the number of siting decisions and the scope of the federal standards, Section 332(c)(7) "fairly bristles with potential issues," *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999), ensuring

further litigation.[8] And the lure of damages and attorney's fees, as well as the ability to avoid the Communications Act's short limitations period, all but guarantee that the resulting lawsuits will, absent this Court's intervention, include Section 1983 claims with increasing frequency.[9]

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[8] For example, federal courts are grappling with whether the requirement of a "decision . . . in writing" mandates not merely a written resolution but a written explanation for the result. See *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998); *Primeco PCS* v. *Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998). There are disputes over the extent to which "[a]esthetic concerns may be a valid basis for denial of a permit." *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002); see *Oyster Bay*, 166 F.3d at 495. Other issues abound. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Mills*, 283 F.3d 404 (2d Cir. 2002) (what constitutes "regulation" of wireless facilities); *American Towers* v. *Williams*, 146 F. Supp. 2d 27, 34-36 (D.D.C. 2001) (whether disputes concerning towers designed to perform both wireless telephone and other functions are reviewable under 42 U.S.C. § 332(c)(7)), *aff'd* 50 Fed. Appx. 448 (D.C. Cir. 2002). And many determinations under the Act are legally and factually complex. See *Willoth*, 176 F.3d at 641 (Determining whether the service qualifies as "personal wireless service" requires "a detailed parsing of the statutory language, including layers of highly technical definitions."); *Aegerter*, 174 F.3d at 891 (whether services are "functionally equivalent"). Many similar issues arose in this litigation. Admin. Rec. 793 (whether respondent's service is "personal wireless service" covered by Section 332(c)(7)); App., *infra*, 24a (whether aesthetic concerns can constitute "substantial evidence"); *id.* at 30a (whether "substantial evidence" requires rationale to appear in the written decision or merely in the record); *id.* at 18a-20a (burdens of proof). Those disputes, moreover, may represent the tip of the iceberg. See p. 26 n.7, *supra* (additional district court cases).

[9] Disputes over the availability of Section 1983 actions and thus attorney's fees for Communications Act violations, moreover, are hardly limited to the context of 47 U.S.C. § 332(c)(7). The federal courts are also confronting the issue in other contexts, including suits against state public utility commissioners for allegedly violating 47 U.S.C. § 251's requirements, see *Verizon Maryland Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002) (rejecting Section 1983 claim because the "1996 Act provides ample—and sufficiently comprehensive—means for vindicating the right at issue"), or for approving mergers that allegedly contravene the Act, see *MCI Telecomm. Corp. v. SNET*, 27 F. Supp. 2d 326, 334 (D. Conn. 1998) (permitting Section 1983 action). Still other

That portends serious consequences for localities across the Nation as they struggle to reconcile local zoning goals with the requirements of federal law. Because "municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983," *Leatherman* v. *TCNICU*, 507 U.S. 163, 166 (1993), the Ninth Circuit's decision threatens to impose potentially crippling liability on local governments for even their good-faith exercises of day-to-day zoning authority. Given the legal uncertainty and complexity of this area, see pp. 27-28 & n.8, *supra*, innocent mistakes are inevitable. That is particularly true for smaller localities. See *Nextel*, 286 F.3d at 695 (noting that "defendants are often small, rural municipalities" with "little familiarity with" the Communications Act); *City of Atlanta*, 50 F. Supp. 2d at 1361 ("[T]here will be some zoning authorities, perhaps less sophisticated and with fewer legal resources * * * who may stumble, albeit in an earnest attempt to comply.").

Already stretched thin by lagging revenues and the expanding demands of protecting their citizens, local governments can ill-afford that new and unexpected financial burden. See, *e.g.*, F. Hinchey, *Some Towns Struggling to Light Up The Night Sky*, Columbus Dispatch, June 29, 2003, at D01 (noting budget concerns, including "flat tax collections, and, in many cases, increased costs for homeland security"). A single erroneous zoning decision may cost the smallest of towns hundreds of thousands of dollars, potentially at the expense of basic governmental services. Because the plaintiffs under Section 332(c)(7) are typically large telecommunications companies with both the inclination and the resources to litigate these disputes thoroughly, the potential liability is significant. As Judge Carnes recently noted:

Section 1983 suits have been brought claiming violations of 47 U.S.C. § 253. See, *e.g.*, *Qwest Corp.* v. *City of Santa Fe*, 224 F. Supp. 2d 1305, 1315 (D.N.M. 2002) (rejecting Section 1983 action); *Sprint PCS* v. *County of San Diego*, 2004 WL 718424, at *10-*16 (rejecting *Qwest* and allowing Section 1983 action).

> [C]orporations like AT&T Wireless [do not] need reimbursement of attorney fees to make it financially feasible for them to challenge in court regulatory denials that cost them money. Their financial self-interest and the vast sums at stake make them more than happy to * * * to enforce the legislative measures that they have lobbied through Congress * * * .

AT&T Wireless, 210 F.3d at 1330 (concurring opinion).[10]

Equally troubling, municipalities concerned about potential liability may shrink from meaningfully overseeing the placement of wireless communications towers. Many communities simply lack sufficient resources to risk damages and attorney's fees, forcing them to err on the side of granting even questionable requests so as to avoid potential litigation and liability.[11] The resulting overdeterrence would be inconsistent with Congress's stated objective in Section 332(c)(7) to preserve local zoning authority. It would also produce a patchwork of antenna towers sited with little regard to legitimate zoning and planning requirements. Those effects are likely to be enduring, because commercial towers and antennae are rarely removed once approved and erected. See Martin, *supra*, at 501. This Court's review is necessary to prevent those potentially irreversible consequences.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] Judge Carnes noted the irony of allowing telecommunications giants to seek money from small municipalities under a civil rights statute: "Section 1988 was intended to help the civil rights Davids of the world do battle with governmental Goliaths. [Plaintiff] AT&T Wireless is a seven-billion dollar multi-national corporation. My, how the Davids have grown." 210 F.3d at 1330.

[11] Cf. H. Heineman, *Council to Review Antenna Ordinance*, Santa Monica Mirror, Feb. 18, 2004 (reporting that company responded to tower zoning proposal by "ask[ing] City officials if they 'have considered the budget the City Council wants to allocate for litigation'").

Respectfully submitted,

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May 25, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55681
Argued and Submitted: Aug. 7, 2003
Filed: Jan. 15, 2004

MARK J. ABRAMS,
Plaintiff-Appellant,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES CITY COUNCIL,
Defendants-Appellees,

AND

FRANK LYON; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS W. STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND LARRY CLARK,
Defendants.

Appeal from the United States District
Court for the Central District of California
Stephen V. Wilson, District Judge, Presiding.
D.C. No. CV-00-09071-SVW

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and JANE A. RESTANI,* Judge.

T.G. NELSON, Circuit Judge.

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Mark J. Abrams appeals the district court's denial of § 1983[1] damages. The district court found that the City of Rancho Palos Verdes ("City") violated Abrams' rights under the Telecommunications Act of 1996 ("TCA"). Nonetheless, the court concluded that Congress intended the TCA to provide a comprehensive remedial scheme, thus barring additional remedies under § 1983. We disagree. Section 1983 remedies are available because the TCA does not contain a comprehensive remedial scheme. Therefore, we reverse and remand to the district court.

I. BACKGROUND

Abrams is a Federal Communication Commission ("FCC") licensed, amateur radio operator. He also provides commercial, mobile radio services (otherwise known as personal wireless services) from his home. In 1989, the City issued Abrams a permit to construct an antenna on his property for his amateur use.[2] Abrams used his antenna for both amateur and commercial purposes.

Ten years later, the City learned of Abrams' unauthorized commercial use. The City obtained an injunction preventing Abrams from using his antenna for commercial purposes until he obtained a conditional use permit ("CUP"). However, when Abrams applied for the CUP, the City denied it.

Abrams filed the present action, claiming that the City violated his rights under the TCA. Invoking § 1983, Abrams sought declaratory relief, injunctive relief, damages, attorney's fees, and costs. The district court agreed with Abrams and found that the City did not have a valid reason to deny Abrams a CUP, and ordered the City to grant Abrams' permit. However, the district court concluded that the TCA

[1] 42 U.S.C. § 1983.

[2] Although the City's policy limits antennas to a height of 40 feet, the inspector approved Abrams' plan to build a 52.5–foot antenna.

subsumed all of Abrams' remedies. Thus, the court declined his request for damages, attorney's fees, and costs. Abrams appealed.

II. ANALYSIS

The parties do not dispute the facts in this case. Therefore, the only question before us is whether the TCA contains a comprehensive remedial scheme, evincing Congress's intent to preclude remedies under § 1983.[3] The Ninth Circuit has never answered this question.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's statutory interpretation of § 1983 and the TCA.[4]

A. *Section 1983*

Section 1983 is a remedial provision. It provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[5]

To obtain remedies pursuant to § 1983, a plaintiff must first establish a federal "right."[6] Once a plaintiff satisfies the initial burden of proving he has a federal statutory right, he creates a rebuttable presumption that he is entitled to § 1983

[3] Abrams has conceded all state-law claims that he initially raised in this appeal.

[4] *Sea–Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 (9th Cir. 2002).

[5] 42 U.S.C. § 1983.

[6] *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997).

remedies.[7] The parties do not dispute the fact that the TCA clearly grants enforceable "rights."[8] Thus, the only question in this case is whether the City can rebut the presumption that Congress intended § 1983 remedies to be available for TCA violations.

The City can rebut the presumption in favor of § 1983 remedies if it can prove that Congress either expressly or impliedly foreclosed § 1983 remedies.[9] The TCA's language provides no support for the theory that Congress expressly foreclosed § 1983. Thus, the question further narrows to whether Congress impliedly foreclosed § 1983 remedies.

Congress impliedly forecloses § 1983 remedies when it "creat[es] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[10] However, the existence of administrative mechanisms to safeguard an individual's interests does not evince the requisite congressional intent.[11] In other words, it is not enough that Congress provides procedures by which a plaintiff can enforce his rights under a statute.[12] The City must prove that through the remedies Congress provided in the TCA, it

[7] *Id.* at 341, 117 S. Ct. 1353.

[8] *Id.* at 340–41, 117 S. Ct. 1353.

[9] *Id.* at 341, 117 S. Ct. 1353.

[10] *Id.*

[11] *Id.* at 347, 117 S. Ct. 1353.

[12] *See Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 424, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987) (holding that "the administrative scheme of enforcement" did not foreclose other remedies); *id.* at 425, 107 S. Ct. 766 (requiring remedial scheme "to raise a clear inference that Congress intended to foreclose a § 1983 cause of action"); *id.* at 427, 107 S. Ct. 766 (distinguishing cases involving other statutes that provide private judicial remedies, evincing congressional intent to foreclose § 1983 remedies).

intended to "close the door on § 1983 liability."[13] We hold that the City has not met this burden.

B. *The TCA*

Congress enacted the TCA to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[14] The TCA requires that state and local governments support any denial of "a request to place, construct, or modify personal wireless service facilities . . . in writing . . . [with] substantial evidence contained in a written record."[15] The TCA also provides that:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government . . . may petition the Commission for relief.[16]

Thus, the TCA does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs. Rather, the TCA only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress TCA violations (an

[13] *Blessing*, 520 U.S. at 348, 117 S. Ct. 1353; *see also Wright*, 479 U.S. at 423–24, 107 S. Ct. 766 ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." (internal quotation marks omitted)).

[14] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[15] 47 U.S.C. § 332(c)(7)(B)(iii).

[16] *Id.* § 332(c)(7)(B)(v).

action in any court of competent jurisdiction and permissive ability to petition the Commission). The question is whether the TCA's provisions are so comprehensive that they close the door on § 1983 liability.

C. *The TCA Does Not Contain a Comprehensive Remedial Scheme*

In the case before us, the TCA provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction, and before the Commission. However, the statute grants no remedies beyond procedural rights. The procedural provisions are insufficient for us to conclude that the TCA contains a comprehensive remedial scheme that closes the door on § 1983 liability.

The cases in which courts have found that Congress implied its intent to foreclose resort to § 1983 remedies presented remedial schemes more comprehensive than, and thus distinguishable from, the TCA. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[17] the Supreme Court held that Congress impliedly foreclosed § 1983 remedies because the two rights-creating statutes at issue had "unusually elaborate enforcement provisions."[18] The statutes permitted civil penalties,[19] litigation costs,[20] injunctive relief,[21] and suspensions or revocations.[22] Therefore, the Court concluded that "Congress provided precisely

[17] 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

[18] *Id.* at 13, 101 S. Ct. 2615.

[19] 33 U.S.C. § 1415(d).

[20] 33 U.S.C. § 1365(d).

[21] 33 U.S.C. § 1415(d).

[22] 33 U.S.C. § 1415(f).

the remedies it considered appropriate" and refused to read more into it.[23]

In *Department of Education v. Katherine D.*,[24] we held that the underlying statute was sufficiently comprehensive so as to evince Congress's intent to foreclose § 1983 remedies. The underlying statute established an elaborate procedural scheme and provided the reviewing court with authority to grant appropriate relief.[25] This court held that the rights granting statute's "complex provisions . . . create a comprehensive and exclusive remedial scheme that precludes reliance upon a cause of action under section 1983."[26]

The TCA differs from both the statutes in *Sea Clammers* and the statute in *Katherine D.* because the TCA does not provide for any type of relief. While one may argue that the lack of any damages in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983. An implied preservation is consistent with the presumption in favor of § 1983 remedies.[27] Thus, in this case, where the TCA contains no remedies at all, we must

[23] *Sea Clammers*, 453 U.S. at 15, 101 S. Ct. 2615.

[24] 727 F.2d 809 (9th Cir. 1983).

[25] 20 U.S.C. § 1415(l)(2), (3).

[26] *Katherine D.*, 727 F.2d at 820.

[27] *Buckley v. City of Redding*, 66 F.3d 188, 192–193 (9th Cir. 1995). In *Buckley*, we held that an enforcement mechanism was insufficient to overcome the presumption for § 1983 remedies. *Id.* at 193. The court said: "To preclude enforcement under section 1983, the Act's remedial scheme must be so comprehensive as to leave no room for additional private remedies." *Id.* at 192–93 (citing *Suter v. Artist M.*, 503 U.S. 347, 360 n. 11, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992)). Our language leaves room for a statute to provide some private remedies without entirely foreclosing § 1983 remedies.

conclude that Congress did not intend to foreclose § 1983 remedies.

When faced with the same question before us, the Third Circuit in *Nextel Partners Inc. v. Kingston Township*[28] held that the TCA was incompatible with § 1983 and thus foreclosed its remedies.[29] The *Nextel* court concluded that the TCA contained a comprehensive remedial scheme because of its short statute of limitations, expedited review, and judicial jurisdictional provisions.[30] The court also concluded that § 1983 and the TCA were incompatible because § 1983 permits attorney's fees, whereas the TCA does not.[31] Moreover, § 1983 has a longer limitations period and does not contain any provision for expeditious reviews.[32] Thus, the Third Circuit concluded that § 1983 remedies could not be granted without upsetting the TCA's remedial scheme, and it held that Congress impliedly foreclosed § 1983 remedies.[33]

The Third Circuit's reasoning is flawed in several respects. First, the TCA's provisions are not remedial. We can hardly consider the limitations period a remedy. Shortening the limitations period to thirty days imposes a burden on an aggrieved plaintiff, not a benefit. The TCA's provision allowing a plaintiff to "commence an action in any court of competent jurisdiction" is hollow as well. The only benefit to an aggrieved plaintiff is expedited judicial review. However, an expedited decision does nothing to remedy a TCA

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[28] 286 F.3d 687 (3d Cir. 2002).

[29] *Id.* at 695.

[30] *Id.* at 694–95.

[31] *Id.* at 695.

[32] *Id.*

[33] *Id.* at 696. *But see Omnipoint Holdings, Inc. v. Town of Westford*, 206 F. Supp. 2d 166, 173–74 (D. Mass. 2002) (holding that the TCA contains only substantive, not remedial, provisions and thus allows § 1983 remedies).

violation in itself. Significantly, a court can fully comply with all of the TCA's provisions before it determines liability. Thus, the TCA contains *procedural*, rather than *remedial*, provisions.

Second, the TCA's provisions are compatible with § 1983's remedies. As we said, the TCA's provisions are procedural in nature—not remedial. Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time. Were we to consider the TCA's procedural provisions sufficiently comprehensive to foreclose § 1983 remedies, we would prevent Congress from ever providing statutes of limitations or other procedural provisions without also defining specific remedies. Such a holding would unnecessarily limit § 1983 remedies to those generic statutes that grant a right and nothing else. We decline to take that path. The TCA's procedural provisions are compatible with § 1983's remedial provisions.

Finally, the Third Circuit's reasoning is contrary to Ninth Circuit precedent in *Keaukaha–Panaewa Community Association v. Hawaiian Homes Commission.*[34] [In] *Keaukaha–Panaewa*, we applied the strong presumption in favor of § 1983 remedies. The underlying statute granted one public remedy. We nonetheless concluded that the rights-granting statute did not contain a comprehensive remedial scheme.[35] The TCA contains no remedial provisions, let alone a comprehensive remedial scheme. Thus, we depart from the Third Circuit and hold that Congress did not impliedly foreclose § 1983's remedial provisions.

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[34] 739 F.2d 1467 (9th Cir. 1984).

[35] *Id.* at 1471.

D. *The TCA Confirms Congress's Affirmative Intent to Preserve Section 1983 Remedies*

We further note that Congress did not simply refrain from foreclosing § 1983 remedies by implication. To the contrary, Congress actually affirmed its contrary intent in § 601(c)(1) of the TCA:

> No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments.[36]

As the Eleventh Circuit explained in its vacated decision *AT & T Wireless PCS, Inc. v. City of Atlanta*,[37] the plain language of § 601(c)(1) demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change.[38] Section 1983 clearly falls within the parameters of this general savings clause.[39]

Certainly, Congress could have been more specific in addressing the preservation of § 1983 remedies. In addition to enacting § 601(c)(1), Congress preserved state and local tax laws in § 601(c)(2) and provided in § 601(b)(1) that the TCA would not alter the applicability of antitrust laws. But, as the Eleventh Circuit observed, Congress was not required to be any more specific than it was in § 601(c)(1).[40] The import and scope of the general savings clause's language are clear.

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[36] Pub. L. No. 104–104 § 601, 110 Stat. 143 (1996), *reprinted in* 47 U.S.C. § 152, historical and statutory notes.

[37] 210 F.3d 1322 (11th Cir. 2000), *vacated on rehearing en banc by* 260 F.3d 1320 (11th Cir. 2001).

[38] *Id.* at 1328.

[39] *Id.*

[40] *Id.* at 1329–30.

The Supreme Court has held in other instances that savings clauses did not provide evidence of Congress's intent to preserve § 1983 remedies. In *Sea Clammers*, the Court concluded that the Federal Water Pollution Control Act ("FWPCA")[41] and Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), codified in scattered sections of 33 U.S.C., impliedly foreclosed § 1983 remedies.[42] The Court then held that the statutes' savings clauses did not indicate that Congress had intended to preserve recourse to § 1983.[43] The FWPCA savings clause provided:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).[44]

The MPRSA savings clause provided:

> The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).[45]

The Court reasoned that these savings clauses were intended to preserve plaintiffs' rights to sue to enforce "anti-pollution standards arising under *other* statutes or state common

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[41] 33 U.S.C. §§ 1251–1387.

[42] *Sea Clammers*, 453 U.S. at 21, 101 S. Ct. 2615.

[43] *Id.* at 20 n. 31, 101 S. Ct. 2615.

[44] *Id.* at 7 n. 10, 101 S. Ct. 2615 (quoting 33 U.S.C. § 1365(e)) (citation omitted).

[45] *Id.* at 7 n. 11, 101 S. Ct. 2615 (quoting 33 U.S.C. § 1415(g)(5)) (citation omitted).

law,"[46]—that is, substantive rights independent of those created by the FWPCA and MPRSA. Because § 1983 does not itself confer substantive rights but "merely provides a mechanism for enforcing individual rights 'secured' elsewhere,"[47] this was quite different from an intent to preserve a cause of action under § 1983, based on the very substantive rights created by the FWPCA and MPRSA.[48]

As the Eleventh Circuit reasoned, the TCA's savings clause is distinguishable from the FWPCA's and MPRSA's savings clauses. The TCA's general savings clause forbids the impairment of any federal "law"—not the impairment of any "right." Thus, the TCA's general savings clause sweeps more broadly than those the Supreme Court evaluated in *Sea Clammers* and includes § 1983 within its ambit.

In sum, we are persuaded by the Eleventh Circuit's reasoning. While our analysis that Congress did not foreclose resort to § 1983 by implication is sufficient on its own, we further hold that Congress, by enacting § 601(c)(1) of the TCA, indicated its affirmative intent to preserve § 1983 remedies.

III. CONCLUSION

The City failed to rebut the presumption in favor of § 1983 remedies. Accordingly, the presumption applies, and the district court should award § 1983 damages.[49]

REVERSED AND REMANDED.

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[46] *Id.* at 10 n. 31, 101 S. Ct. 2615.

[47] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

[48] *See Sea Clammers*, 453 U.S. at 10 n. 31.

[49] Our holding makes it unnecessary to address Abrams' argument that, regardless of whether § 1983 remedies are available under the TCA, he could still have recovered attorney's fees under § 1988 for a due process violation.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV00-09071-SVW (RNBx)
Filed: Mar. 18, 2002

MARK J. ABRAMS,
Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY,
Defendants and Respondents.

JUDGMENT OF INJUNCTION

On December 3, 2001, after reviewing trial briefs from the parties, and after reviewing the six-volume administrative record of proceedings lodged with the Court, the Court heard the petition filed by plaintiff Mark J. Abrams ("plaintiff") under the Telecommunications Act of 1996 ("TCA") (47 U.S.C. § 332(c)). Plaintiff challenged the decision of defendant City Council of the City of Rancho Palos Verdes ("City Council") to deny him a Conditional Use Permit ("CUP") to allow the existing antenna support structure and the antennae located thereon at 44 Oceanaire Drive for commercial use, as defined in Rancho Palos Verdes Municipal Code Section 17.96.090. On January 9, 2002, the Court entered an Order

vacating the City Council's denial of a CUP. After further briefing by the parties, the Court held a hearing on February 25, 2002 to determine the appropriate remedy. At the conclusion of the hearing, the Court announced that it would issue an injunction remanding the matter to the City Council, and compelling the City Council upon remand to grant plaintiff a CUP subject to reasonable conditions. The Court further announced that the remedies available to plaintiff are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available to plaintiff. Now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the matter of plaintiff's application to the City of Rancho Palos Verdes for Conditional Use Permit No. 207 is remanded to the City Council of the City of Rancho Palos Verdes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes is enjoined, mandated and compelled to set aside its earlier resolution denying plaintiff's application for Conditional Use Permit No. 207 and to adopt a new resolution granting plaintiff a Conditional Use Permit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes may include within the new resolution granting plaintiff a Conditional Use Permit any reasonable conditions that are consistent with the Court's Order entered January 9, 2002. The City Council may not impose a condition requiring plaintiff to lower his existing antenna support structure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes shall begin considering, no later than its regularly scheduled meeting on March 19, 2002, what conditions, if any, to include within the new resolution granting plaintiff a Conditional Use Permit. The City Council of the City of

Rancho Palos Verdes shall adopt the new resolution no later than the following regularly scheduled meeting on April 2, 2002.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction to hear any matters which a party may raise in connection with the issuance of the Conditional Use Permit to plaintiff including, but not limited to, reviewing any conditions which the City Council of the City of Rancho Palos Verdes may impose thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's request for damages under 42 U.S.C. § 1983 and plaintiff's corresponding request for attorney's fees under 42 U.S.C. § 1988 are DENIED.

DATED: March 18, 2002

/s/ STEVEN V. WILSON
STEVEN V. WILSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

No. CV00-09071-SVW (RNBx)
Filed: Jan. 9, 2002

MARK J. ABRAMS,
Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES PLANNING COMMISSION; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY,
Defendants and Respondents.

ORDER GRANTING PETITION TO VACATE DEFENDANTS' DECISION TO DENY PLAINTIFF A CONDITIONAL USE PERMIT

I. INTRODUCTION

Plaintiff is seeking a reversal of the denial of a conditional use permit (CUP) on the grounds that the decision by Defendant City of Rancho Palos Verdes City Council was in

violation of the Telecommunications Act of 1996 (TCA).[1] In particular, Plaintiff claims that the decision is in violation of three provisions of the Act: (1) the decision unreasonably discriminates against providers of functionally equivalent personal wireless services (§ 332(c)(7)(B)(i)(I)); (2) the decision has the effect of prohibiting the provision of personal wireless services (§ 332(c)(7)(B)(i)(II)); and (3) the decision was not supported by substantial evidence contained in a written record (§ 332(c)(7)(B)(iii)).

Additionally, Plaintiff contends that he is entitled to monetary relief under 42 U.S.C. § 1983, and argues that he is entitled to relief under California law as well. Specifically, Cal. Civ. Proc. Code § 1094.5 allows for a mandamus review of administrative decisions under an abuse of discretion standard.

Given the heightened standard of review under the California code as compared to the TCA, and the fact that the § 1983 claim is dependent on a finding that the TCA was violated, it is only necessary at this time to evaluate whether the Defendants' denial of a CUP violated one of the three TCA provisions cited above.

As set forth below, Plaintiff's petition to vacate Defendants' decision to deny him a conditional use permit, on the

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[1] The relevant portions of Section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)) are as follows:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. . . . (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

grounds that it was in violation of the Telecommunications Act of 1996, is GRANTED. The Court reserves judgment on the appropriate remedy under the TCA and 42 U.S.C. § 1983 pending further briefing.

II. PROCEDURAL BACKGROUND

A. Jurisdiction

This Court has jurisdiction to hear this case pursuant to 47 U.S.C. § 332(c)(7)(B)(v) and 28 U.S.C. § 1331. § 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis."

B. Standing

Plaintiff has standing to bring this action because he is a person allegedly adversely affected by the decision to deny him a CUP. Furthermore, his services are covered by the relevant provisions of the TCA. because they qualify as "personal wireless services" and "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C)(i) and (ii).[2] The parties do not dispute the applicability of the TCA to the Defendants' denial of Plaintiff's CUP application.

III. ANALYSIS

A. Was the Decision Supported By Substantial Evidence?

1. *Burden of Proof*

A major contention in this case surrounds the proper allocation of the burden of proof. As a recent district court

[2] Additional definitions of "mobile service" and "commercial mobile service" are contained in 47 U.S.C. § 153(27) and 47 U.S.C. § 332(d)(1), respectively.

opinion noted, however, there is a split of authority on this issue, and the Ninth Circuit has yet to rule on the subject. *See AirTouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164–65 (S.D. Cal. 2000). Several district courts have held that the party seeking to overturn the administrative decision bears the burden of proof,[3] while other courts have declared that the onus is on the administrative body to support its decision.[4]

Although the parties in *AirTouch Cellular* stipulated as to the burden of proof, the court noted a significant difference between review under (B)(i) and (B)(iii) of § 332(c)(7). In a claim under (B)(iii), there is a deference to local findings, and the reviewing court may not go beyond the administrative record in making its decision. In contrast, under (B)(i), there is no such deference, and outside evidence may be considered. *AirTouch Cellular*, 83 F. Supp. 2d at 1163–64 (citing *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d. Cir. 1999) and *Town of Amherst, N.H. v. Omnipoint Communications Enter. Inc.*, 173 F.3d 9, 16 n.7 (1st Cir. 1999)).

It appears that Congress, under subsection (B)(iii), intended the local regulatory agencies to provide a written account of their decision in order to insure that the decision was justified by substantial evidence, and not to allow the agency to rationalize its decision only upon judicial review. In contrast, evidence showing unreasonable discrimination or prohibition under subsections (B)(i)(I) and (II) must be demonstrated under the totality of the circumstances, and is not

[3] *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 768 n.1 (E.D. Mich. 2001); *Sprint Spectrum L.P. v. Bd. of County Comm'rs of Jefferson County*, 59 F. Supp. 2d 1101, 1105 (D. Colo. 1999)[.]

[4] *See, e.g., Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington*, 3 F. Supp 2d 178, 182 (D. Conn. 1998); *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 49 (D. Mass. 1997).

limited to the written record. Thus, a logical interpretation of this scheme would place the burden on the agency to show that its record contains substantial evidence to support its decision, under (B)(iii), but the burden would be on the telecommunications provider applicant to show that the decision unreasonably discriminated against them, or had the effect of prohibiting the provision of personal wireless service, under (B)(i).

2. *Standard of Review*

The standard of review for (B)(iii) is a less contentious issue. Many courts have relied on the Supreme Court's language in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1952), which defines substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997). "Although the court is not free to substitute its judgment for that of the [local zoning board], it must overturn the board's decision under the substantial evidence test if it 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.' " *See BellSouth Mobility, Inc. v. Gwinnett County, Georgia*, 944 F. Supp. 923, 928 (N.D. Ga. 1996) (quoting *Bickerstaff Clay Products Co., Inc. v. N.L.R.B.*, 871 F.2d 980, 984 (11th Cir. 1989)). However, a court "must uphold a decision that has 'substantial support in the record as a whole' even if it might have decided differently as an original matter." *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998) (quoting *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997)).

Substantial evidence "does not mean a large or considerable amount of evidence, but rather such evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) *quoted in AirTouch Cellular*, 83 F. Supp. 2d at 1164; *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, 181 F.3d 403, 408 (3d Cir. 1999). "In determining whether the evidence before an agency was substantial, a court views the record in its entirety and takes account of evidence unfavorable to the agency's decision." *Omnipoint Corp.*, 181 F.3d at 408 (citing *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981)).

3. *Review of the Record*

Before looking at the evidence on which the City Council relied in denying Plaintiff a CUP, it is helpful to note what Congress itself had considered to be adequate reasons to deny the placement of personal wireless service facilities. The court in *Omnipoint Corp.* provided a useful overview:

> [In passing the TCA,] Congress found that 'siting and zoning decisions by non-federal units of government [ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network.' H.R. Rep. 104-204, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61. But Congress also 'recognize[d] that there are legitimate State and local concerns involved in regulating the siting of such facilities . . . , such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way.' *Id.* at 94–95, reprinted in 1996 U.S.C.C.A.N. at 61. The House version of the Act would have required the FCC to regulate the siting of wireless telephone transmitters, but the Conference Committee instead enacted § 332(c)(7) to 'preserve the authority of

> State and local governments over zoning and land use matters except in . . . limited circumstances . . . .' H.R. Conf. Rep. No. 104-458, at 207–08, reprinted in 1996 U.S.C.C.A.N. at 222.

Omnipoint Corp., 181 F.3d at 407. "As the First Circuit noted, section 332(c)(7) 'is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.' " *Id.* (quoting *Town of Amherst, N.H. v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999)). Thus, in passing the TCA, Congress sought to preserve the right of municipalities to exercise some control over local issues affected by the zoning of personal wireless service facilities, such as the use of public lands.

In light of the above decisions, the Court will now examine the reasons for the City Council's decision. The Council's stated reasons are indicated in Resolution No. 2000-53 ("A Resolution of the City Council of the City of Rancho Palos Verdes Denying the Appeal and Upholding the Planning Commission's Denial of Conditional Use Permit No. 207 with Prejudice, for the Proposed Commercial Use of Existing Antennae on an Existing Antenna Support Structure, Located at 44 Oceanaire Drive in the *Del Cerro* Neighborhood"), found in the Certified Administrative Record (CAR), Vol. 6, Sec. 99, Pages 1656–1668 (hereinafter cited as CAR, 6:99:1656–68). Based on the record, the following are the relevant facts involved in the City Council's decision:

On January 8, 1990, Plaintiff Mark Abrams received approval for a permit to construct a 40-foot high antenna on his property, to be used for amateur radio communications only. For whatever reason, which Defendants claim was erroneous, the permit was issued in April 1990 that allowed Plaintiff to extend the antenna above the 40-foot limit, to its current height of 52 ½ feet. Plaintiff is licensed by the FCC as a Commercial Mobile Radio Service (CMRS) provider, and

apparently has broadcasted commercial signals on the existing antenna, contrary to the conditions of his permit. As a result, the City obtained an injunction against Plaintiff's use of the antenna in 1999, and consequently, Plaintiff was directed to obtain a CUP in order to utilize the existing antenna structure for commercial, as well as amateur, use.

On July 12, 1999, Plaintiff applied for Conditional Use Permit No. 207. Plaintiff's application was denied, and his subsequent appeals were also denied. According to Resolution No. 2000-53, the reasons for the denial were as follows: (1) Plaintiff's original application was approved for an amateur antenna structure, not to be used for commercial purposes or to exceed 40 feet; (2) notwithstanding the original application, Plaintiff's existing antenna stands at a current height of 52 ½ feet, and broadcasts on commercial frequencies; (3) "although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood"; and (4) approval of the CUP "would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects." *See* CAR, 6:99:1659–60.

It is clear from the record that the City, and particularly the community in which Plaintiff resides, detests Plaintiff's antenna structure. The record contains several petitions and letters from the local community protesting the Plaintiff's application. *See* CAR, 1-2:33:164–337. The complaints generally focus on the visual blight of Plaintiff's antenna, the damage to the property value, and the adversity it creates to the "atmosphere and spirit" of the neighborhood. However, the fact remains [that the] antenna is already in existence, thus there is no further aesthetic impact created by Plaintiff's proposed use. Therefore, aesthetic concerns would not consti-

tute a valid reason for the denial of the CUP in this case. Furthermore, "a decision must be based on more than just residents' concern about neighborhood aesthetics." *AirTouch Cellular*, at 1165. As noted in *Omnipoint Corp.*, "a 'few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence' for purposes of § 332 (c)(7)(B)(iii) and, similarly, '[a] few generalized concerns about a potential decrease in property values, . . . does not seem adequate to support a conclusion that the permits should be denied.' " 181 F.3d at 409 (quoting *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999)).

Thus, the Court can glean two actual reasons for the CUP denial: (1) It would contradict the original intention of the 1990 permit; and (2) it could lead to the proliferation of more antennas by other commercial providers.

In light of the available case law, the Court does not consider these reasons sufficient to allow for the denial of the CUP, pursuant to the requirements of the TCA. The first reason indicated above, that the use contradicts the original purpose of the 1990 permit, is immaterial. The record does not indicate that the denial of the CUP would require Plaintiff to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community.[5] "[L]ocal governments may not mask hostility to wireless communications facilities with unreasoned denials that make only vague references to applicable legal stan-

[5] Defendants suggest for the first time at oral argument that, subsequent to denying the CUP, they will be able to have the Plaintiff's antenna tower removed. However, as Defendants admit, this information is not contained in the record, nor do Defendants offer any admissible evidence in support of this contention. *See British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("[L]egal memoranda and oral argument are not evidence . . ."). Therefore, it cannot serve as a basis for concluding that their decision was supported by substantial evidence, in accordance with the TCA.

dards. The procedural requirement of a written decision with articulated reasons based on record evidence forces local governments to rely on supportable neutral principles if they wish to deny a particular wireless installation." *AT&T Wireless Servs. of Florida, Inc. v. Orange County*, 982 F. Supp. 856, 860 (M.D. Fla. 1997).

The second reason—that approval would lead to a proliferation in antennas—is unfounded. While it is certainly possible that there will be additional applications if this CUP is granted, that does not mean that the City must grant permission for all additional antennas to be built. On the contrary, if additional applications propose new structures that will have adverse impacts on the neighborhood, then that would be a basis for denying the applications under the TCA. In *AirTouch Cellular*, the court allowed the city to deny an application to the plaintiff, despite approving a previous application for a different provider of the same service. The court deemed that the plaintiff's application created additional concerns—notably an increase in antennas, adding additional equipment structures, and an increase in visual blight and noise problems—that did not exist in granting the other provider's application. *AirTouch Cellular*, 83 F. Supp. 2d at 1166. Therefore, the City in this case is free to deny additional applications if they pose additional problems, notwithstanding an approval of Plaintiff's application here.

In all of the cases cited by Defendants that found substantial evidence existed to support a zoning board's denial of a CUP, the provider seeking the CUP was attempting to build a new structure. Defendants have not indicated a single case involving the denial of a permit for an existing structure that was supported by substantial evidence. In contrast, in the few cases that involved an existing structure, such as *Smart SMR of New York, Inc. v. Zoning Comm'n of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the courts have found that substantial evidence did not exist.

Accordingly, the evidence included in the record to support the denial of the CUP in the present case does not satisfy the requirements of the TCA.

B. Did the Decision Unreasonably Discriminate?

Plaintiff also claims that the City Council's decision amounts to an unreasonable discrimination among providers of functionally equivalent services, in violation of § 332 (c)(7)(B)(i)(I).

Again, there is a contention over who bears the burden of proof in the situation. As noted in the previous section, Plaintiff cites one set of authority, while Defendants cite another set of contradictory authority. However, a claim under (B)(i), unlike (B)(iii), encompasses all available evidence, and not solely the administrative record. Thus, it is less compelling under a (B)(i) claim that there should be a deviance from the usual burden being placed on the plaintiff, because the plaintiff is no longer limited to the defendant's accumulation of the evidence in a written record.

Regardless, it is clear that the standard under this provision is not whether the Defendant discriminated against Plaintiff, but whether it did so *unreasonably*. *See, e.g., Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638–39 (2d Cir. 1999). A zoning authority acts reasonably if it had a legitimate basis for its denial of a CUP. *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 979 F. Supp. 416, 425 (E.D. Va. 1997). "According to the legislative history, a zoning authority may consider factors such as visual, aesthetic, or safety concerns." *Smart SMR*, 995 F. Supp. at 59 (citing H.R. Rep. No. 104-458, at 208 (1996)).

As an initial matter, Defendants assert that Plaintiff does not compete with providers of functionally equivalent services, such as cellular telephone utility companies, which do not have to obtain CUPs because they are exempted from the definition of "commercial antenna" in the City's ordinance.

See CAR, 5:83:1474. It is undisputed that Plaintiff does not provide cellular service, but instead provides two-way radio personal wireless communication. Defendants cite to various points in the record where Plaintiff contends that his service competes with cellular service, and other citations where Plaintiff claims that his service is different than cellular service. Defendants' Opp'n, at 7–8.

In response, Plaintiff claims that he does compete with cellular services. First, he claims that it is logical to conclude that if a customer desires two-way radio service, but cannot obtain such service, then he would have to move to cellular service. Therefore, while their services are not identical, radio service and cellular service are competitors, and provide competing services. Plaintiff's Reply, at 9–11. Moreover, the company Nextel does provide a "functionally-equivalent" service, because it combines two-way radio (Plaintiff's service) and cellular service into one unit. Thus, at the very least, there is one functionally-equivalent service to Plaintiff's.

Assuming the Plaintiff's service is functionally-equivalent with one of Nextel's services, Defendants still claim that its decision "was well-grounded in its legitimate land use concerns of avoiding proliferation of commercial antenna towers in residential neighborhoods." Defendants' Opp'n, at 8. "The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable . . . ." *Virginia Beach*, 979 F. Supp. at 425.

However, as noted in the previous discussion, Defendants' reasons for denying the CUP do not appear legitimate or convincing. Therefore, if Defendants cannot show that they had substantial evidence to deny Plaintiff's CUP application in the first place, it follows that, with nothing more, their discrimination against Plaintiff's service could be deemed unreasonable. The operative fact here is that there is already an existing structure on Plaintiff's property, regardless of the

City's aversion to the structure. Defendants do not provide any admissible evidence from which to conclude that as a consequence of denying the CUP, they will thereby be able to force Plaintiff to remove the antenna structure that they had at one time approved. Even if that was their intention, as it stands, Plaintiff's structure is legally on his property, and therefore any aesthetic and visual concerns surrounding the CUP could only relate to modifications in the existing structure. However, as Defendants concede in Resolution No. 2000-53, "approval of the proposed use would *not create new adverse visual impacts* . . . ." CAR, 6:99:1660 (emphasis added).

The court in *Smart SMR* faced a somewhat similar situation—in that there was an existing structure—and decided that only the aesthetic implication with regard to the modifications could be considered. Furthermore, the court noted that "the [zoning authority] cannot rely on the commercial nature of [the plaintiff's] facility as a substantial basis for its decision." *Id.* at 59. Therefore, Defendants' decision, in light of the available evidence, appears unreasonable.

As a final matter, Defendants have proposed at least one alternative site from which Plaintiff can conduct its service. Defendants' Opp'n, at 11. Defendants contend that Plaintiff, in order to prevail on an unreasonable discrimination claim, has to show that the alternative site would not provide coverage equivalent to a competitor's. *See Willoth*, 176 F.3d at 638. Whether Plaintiff actually must make this showing, however, is unclear. First, the court in *Willoth* merely mentioned that the plaintiff in that case did not make the above showing; the court did not say that such a showing was a prerequisite to recovery. Second, the *Willoth* court also found that the defendant's decision to deny the permit was supported by substantial evidence. That being the case, it appears much easier to conclude that any resulting discrimination was reasonable.

Notwithstanding the question of its relevance, the record does indicate that Defendants have proposed an alternative site (at St. John Fisher Church) to Plaintiff, which Defendants' experts contend would satisfy Plaintiff's needs. *See* CAR, 4:60:987 (Item 7); 5:78:1421–22. Plaintiff disputes that such a site would be as adequate as the one for which he is seeking a CUP, and, at the very least, having to construct a new antenna at the alternative site would be cost-prohibitive. Plaintiff's Reply, at 14–15. Nevertheless, the outcome under this provision in this case ultimately turns on whether the City's refusal to allow Plaintiff a CUP on his property was reasonable, without regard to any alternative sites, considering Plaintiff already has an existing structure at the proposed site. As discussed above, the record does not support Defendants' decision under the "substantial evidence" analysis. Even outside of the record, Plaintiff appears to have carried his burden of showing that Defendants' decision was unreasonable as well.

However, at oral argument, Defendants indicate that the CUP should not be allowed because Plaintiff had subverted the permit process by first applying for an amateur license, and then applying for a commercial license after the antenna was already erected and approved. While there is no evidence from which to conclude that Plaintiff did in fact have dubious intentions when he applied for an amateur license, this does present an interesting quandary. Although this potential loophole in the licensing structure is Defendants' own doing, since it is only possible through the commercial and amateur licensing schemes that Defendants have promulgated themselves, Defendants argue that their relaxed process for obtaining an amateur radio operator's license is in accordance with FCC policy, PRB-1. *See* 101 F.C.C.2d 952 (1985).[6] Therefore, pursuant to Defendants' argument, these

[6] PRB-1 instructed that "State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it

government policies (the TCA of 1996 and PRB-1) allow for a potential commercial operator to obtain commercial licensing approval despite the objections of the licencing body, by first obtaining an amateur license, as Plaintiff has allegedly attempted to do here.[7]

While the Court acknowledges this potential problem, it need not be resolved here. The Court has already concluded that the denial of the CUP was not supported by substantial evidence contained in the written record, and therefore was in violation of the TCA. Thus, even if the denial of the CUP did not unreasonably discriminate against Plaintiff, because the decision was necessary to avoid the creation of a licensing loophole, this reason was not stated in the record, and therefore does not satisfy the requirements of (B)(iii).[8]

C. Was the Decision a Prohibition on the Provision of Personal Wireless Services?

This is Plaintiff's weakest contention. In order to show that a decision has the effect of prohibiting the provision of personal wireless services, courts have declared that the zoning authority's decision must amount to a ban.

> If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will

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must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." 47 C.F.R. § 97.15 (2001).

[7] However, nothing in the FCC policy (or the TCA) sets forth a specific licensing structure that a local government must follow. That is left to the discretion of the local government or municipality, to be exercised in accordance with the policies discussed by the FCC.

[8] The Court is not implying that Defendants' argument regarding PRB-1 would necessarily defeat Plaintiff's claim of a § 332(c)(7)(B)(i)(I) violation in this case. The Court is simply declining to rule on the matter, in light of its previous ruling under § 332(c)(7)(B)(iii).

> almost certainly exist for the denial. In that event, the regulation is unlawful under the statute's 'effect' provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

Amherst, 173 F.3d at 14 (citation omitted). The *Amherst* court noted, however, that if the plaintiff's existing proposal were the only feasible plan, then its denial might amount to a prohibition of personal wireless service. Nevertheless, given the Defendants' alternative site proposal, that is not the case here.

In light of this difficult standard, at least one court has suggested that the provider "must bring additional proof to the court to demonstrate that the denial is representative of a broader policy or circumstance that precludes the provision of wireless service." *APT Pittsburgh Ltd. P'Ship v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469, 479 (3d Cir. 1999). "In order to show a violation of subsection 332(c)(7)(B)(i)(II) under *Willoth*, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. . . . Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.* at 480.

In *360° Communications v. Bd. of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), however, the Fourth Circuit rejected the above rule followed by the Second and Third Circuits. "We believe that this statutory question requires no additional formulation and can best be answered through the case-by-case analysis that the Act anticipates." *Id.* at 87.

Regardless of the appropriate test, Plaintiff is unable to satisfy his burden. First, most courts agree that the burden in this instance is on the provider applicant, and it is a heavy one. *See, e.g., Amherst*, 173 F.3d at 14. Second, Plaintiff's contention that the denial of the CUP results in coverage gaps is not supported by sufficient evidence. Third, Plaintiff's argument that his proposal is the "least intrusive means" is rebutted by Defendants, who claim that a structure at the alternative site would be less intrusive, even if it is less optimal. Finally, Defendants have twice before approved CUPs for commercial antennae on single-family zoned property, which they claim clearly indicates their decision here does not amount to a "ban." *See* CAR, 5:76:1384–85.

Taken together, Plaintiff has failed to demonstrate that the City Council's decision to deny him a CUP amounts to a prohibition of the provision of personal wireless services.

IV. REMEDY

The relevant provisions of the TCA direct the Court to "decide [this] action on an expedited basis." 47 U.S.C. § 332 (c)(7)(B)(v). Accordingly, the Court is given broad authority to fasten an appropriate remedy that would bring expedited relief. *See Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997) (finding that the TCA vests the district court with sufficient authority to grant mandamus relief); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (finding that appropriate relief under the TCA was an injunction directing the county to issue the requested special use permit).

The Court orders the parties to submit further briefing (no more than ten pages in length) regarding the appropriate remedy in this case, as well as on the issue of damages pursuant to 42 U.S.C. § 1983. The Plaintiff is directed to file his brief no later than January 28, 2002. The Defendants are directed to file their response to Plaintiff's brief no later than

February 11, 2002. A hearing on this matter is hereby set for February 25, 2002 at 1:30 pm.

V. CONCLUSION

Based on the above discussion, Plaintiff's petition to vacate Defendants' decision to deny him a conditional use permit, on the grounds that it was in violation of the Telecommunications Act of 1996, is GRANTED. The Court reserves judgment on the appropriate remedy under the TCA and 42 U.S.C. § 1983 pending further briefing.

IT IS SO ORDERED.

DATED: 1/9/02

/s/ Stephen V. Wilson
STEPHEN V. WILSON
United States District Judge

APPENDIX D

RESOLUTION NO. 2000-53

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DENYING THE APPEAL AND UPHOLDING THE PLANNING COMMISSION'S DENIAL OF CONDITIONAL USE PERMIT NO. 207 WITH PREJUDICE, FOR THE PROPOSED COMMERCIAL USE OF EXISTING ANTENNAE ON AN EXISTING ANTENNA SUPPORT STRUCTURE, LOCATED AT 44 OCEANAIRE DRIVE IN THE *DEL CERRO* NEIGHBORHOOD

WHEREAS, on January 8, 1990, the applicant/appellant, Mark Abrams, received approval of an application for Site Plan Review No. 5322 to permit the construction of a 40-foot-tall amateur radio antenna support structure and array on his property at 44 Oceanaire Drive in the *Del Cerro* neighborhood, which could be used only for amateur radio communications and was conditioned expressly to exclude commercial operations; and

WHEREAS, on January 19, 1998, Mr. Abrams received approval of an application for Site Plan Review No. 8017 to permit the construction of a second, similar amateur radio antenna support structure and array on the same property; and

WHEREAS, on January 20, 1998, the City's approval of Site Plan Review No. 8017 was appealed to the Planning Commission by Karyl Newton, the owner of the adjacent property at 46 Oceanaire Drive; and

WHEREAS, at a duly noticed public hearing on the appeal of Site Plan Review No. 8017, Mr. Abrams admitted that there was at least one antenna on the existing support structure and array that was used for commercial purposes,

and evidence was also presented to the Planning Commission which confirmed this commercial use and demonstrated that the existing antenna support structure and array was taller than forty feet (40'0"); and

WHEREAS, the Planning Commission's consideration of the appeal of Site Plan Review No. 8017 was continued to a date certain, and was subsequently tabled by the imposition of a moratorium on applications for second antenna support structures, and the application subsequently was voided by the enactment of revisions to the City's antenna regulations; and

WHEREAS, the City investigated the allegations regarding the height of the existing antenna support structure and array and found that Building Permit No. 9827 had been erroneously issued and finaled in 1990 to allow the antenna support structure and array to exceed the 40-foot height limit; and

WHEREAS, the City obtained warrants from the court and retained an expert in the field of radio transmissions, Dr. Henry Richter, to monitor transmissions from the site in connection with an investigation of the allegations regarding commercial use of the existing antennae and found that the allegations were valid. Subsequently, on June 29, 1999, the Los Angeles County Superior Court granted the City's motion for a preliminary injunction, and on September 13, 1999, the court issued its written order, preventing Mr. Abrams from using the antennae for commercial purposes unless and until the City approved a conditional use permit for that use; and

WHEREAS, Section 17.76.020(A) of the Rancho Palos Verdes Municipal Code requires an individual to obtain a conditional use permit to install or operate a commercial antenna within the City of Rancho Palos Verdes

("City"). Section 17.96.090 defines the term "commercial antenna" as follows:

> " 'Commercial Antenna' means all antennas, parabolic dishes, relay towers and antenna support structures used for the transmission or reception of radio, television and communication signals for commercial purposes. For the purpose of this definition, 'commercial purposes' shall mean communications for hire or material compensation, or the use of commercial frequencies, as these terms are defined by the Federal Communications Commission (FCC). 'Commercial antennas' shall not include antennas owned or operated by governmental agencies; and microcell cellular antennas, owned and operated by state licensed cellular telephone utility companies, located on existing utility poles within the public right-of-way."

Under these provisions of the Rancho Palos Verdes Municipal Code, the applicant, Mr. Abrams, was required to obtain a conditional use permit from the City to use his existing antennae and antenna support structure to broadcast on commercial frequencies, as determined by the Federal Communications Commission ("FCC"); and

WHEREAS, on July 12, 1999, September 30, 1999, and January 21, 2000, Mr. Abrams submitted applications and supplemental information for Conditional Use Permit No. 207 and Environmental Assessment No. 720 to allow the commercial use of certain of the existing antennae on the existing antenna support structure on his property in the *Del Cerro* neighborhood; and

WHEREAS, on January 31, 2000, the applications for Conditional Use Permit No. 207 and Environmental Assessment No. 720 were deemed complete by Staff; and

WHEREAS, pursuant to the provisions of the California Environmental Quality Act, Public Resources Code Sections 21000 *et. seq.* ("CEQA"), the State's CEQA Guidelines,

California Code of Regulations, Title 14, Section 15000 *et. seq.*, the City's Local CEQA Guidelines, and Government Code Section 65962.5(f) (Hazardous Waste and Substances Statement), the City of Rancho Palos Verdes prepared an Initial Study and determined that the approval of Conditional Use Permit No. 207 could result in a significant adverse effect upon the environment unless mitigation measures were imposed and, therefore, a draft Mitigated Negative Declaration has been prepared and notice of same was given in the manner required by law; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code and the State CEQA Guidelines, the Planning Commission held a duly noticed public hearing on April 25, 2000, and May 9, 2000, at which time all interested parties were given an opportunity to be heard and present evidence; and

WHEREAS, on May 9, 2000, the Planning Commission adopted P.C. Resolution No. 2000-12, thereby denying the application for Conditional Use Permit No. 207 with prejudice; and

WHEREAS, on May 10, 2000, within the 15-day appeal period prescribed by Section 17.80.070 of the Rancho Palos Verdes Development Code, Mr. Abrams appealed the Planning Commission's denial of Conditional Use Permit No. 207 to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code, the City Council held a duly noticed public hearing on June 6, 2000, and July 5, 2000, at which time all interested parties were given an opportunity to be heard and present evidence; and

WHEREAS, after the public hearing was closed on July 5, 2000, the applicant objected to some of the information that had been submitted to the City Council during the public

hearing and also sought to present additional information to the City Council, even though the public hearing already had been closed; and

WHEREAS, in order to address Mr. Abrams' concerns, on July 18, 2000, the City Council directed staff to re-notice the public hearing so that it could be re-opened and any additional information that is relevant to the application could be considered by the City Council prior to making a decision on the application; and

WHEREAS, the re-opened public hearing was held on August 15, 2000, at which time all interested parties were given an opportunity to be heard and present evidence that had not been presented previously to the City Council;

NOW, THEREFORE, THE CITY COUNCIL DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The site is not adequate in size and shape to accommodate the proposed commercial use because Sections 17.76.020(A)(5) and 17.76.020(A)(8) of the Rancho Palos Verdes Development Code require that the proposed commercial use "have the least visual impact on the environment" and provide landscaping and screening to "screen and buffer towers, accessory uses and stored equipment," respectively, but the existing tower is sited and designed to take maximum advantage of the elevation and topography, and not to minimize its visual impacts on adjacent properties. If the subject property were larger so that the tower could be located further from adjacent residences and rights-of-way, the increased distance might have the effect of screening and buffering the visual impacts of the existing tower. Attempting to screen the existing tower and antennae with foliage would not be effective because most surrounding properties are at the same elevation or only slightly higher than the subject property. Therefore, given the constraints of the subject

property, it is not reasonably possible to reduce the visual impacts of the existing tower and antennae without modifying its height, location and/or configuration.

Section 2: In response to a question that was posed during the public hearing on the appeal, the applicant, Mr. Abrams, stated that he would not consider any alteration or reduction of the height, size, configuration or location of the existing tower or any of the antennae located thereon in order to reduce the visual and aesthetic impacts of the antenna tower upon adjacent properties or the surrounding neighborhood. On the other hand, the City's expert, Dr. Richter, testified that in his professional opinion, if the height of the applicant's antenna support structure and the antennas located thereon were reduced from the current height of fifty-two and one-half feet to forty feet, there would not be an appreciable change in the applicant's ability to transmit radio signals. Dr. Richter further opined that it was possible to reduce the overall mass of the antenna structure and the number of antennae located thereon and still allow Mr. Abrams to transmit both on commercial and amateur frequencies from his property at 44 Oceanaire Drive.

Section 3: The approval of the subject commercial use at this specific location will result in significant adverse effects on adjacent properties and the permitted use thereof because the commercial use of some of the antennae constitutes an intensification of the use of the antennae, and this intensification of use financially benefits the applicant and his business while causing negative visual impacts from the location, height and size of the antenna tower upon surrounding residential properties.

A. The application that was approved by the City in 1990 was for an amateur antenna structure that was expressly conditioned not to be used for commercial purposes and not to exceed forty feet in height, and the applicant expressly agreed to those conditions. Notwithstanding

those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet.

B. In addition, when the City's expert, Dr. Henry Richter, monitored radio transmissions from the subject property in 1999, pursuant to a warrant issued by the court to the City, Dr. Richter detected transmissions on at least three commercial frequencies that had been licensed previously by the FCC to be transmitted from the subject property. Mr. Abrams testified that those transmissions were sent from portable tripod antennas that were located on the ground, behind the rear wall of the subject property and not from the existing structure that had been permitted by the City, and that due to their location behind the wall, they did not function well. However, the City Council cannot determine the accuracy of the applicant's testimony. The City's expert, Dr. Richter, testified that while he was monitoring the site, he could clearly see the rear wall of the property, which he photographed, and he did not observe any tripod antennas that exceeded the height of the rear wall so that the wall would not have interfered with the commercial transmissions from the alleged portable antennas. Mr. Abrams' application demonstrates that the three tallest antennae that are located on the uppermost portion of the antenna support structure would accommodate commercial use, as would many of the other antennae that are located elsewhere on the antenna support structure. (*See also*, paragraph 1 of Abrams' letter dated August 11, 2000.) Thus, it appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet was to accommodate the commercial use of some of the antennae that are located on the tower, even though the permit issued by the City in 1990 specifically provided

that no commercial transmissions could occur and that the height of the antenna structure could not exceed forty feet.

C. Currently, the tower is visually prominent within the neighborhood, and due to its height, configuration and close proximity to surrounding residences and lack of screening or buffers, it has an adverse impact upon adjacent properties. The applicant testified that he would not be willing to modify the antenna tower or any of the antennae located thereon to reduce the adverse aesthetic and visual impacts. Therefore, although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood.

D. In addition to the visual impacts of the existing antennae and tower, the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects. Such proposals are likely—given the neighborhood's elevation, topography and unique geographic setting—and would have significant adverse cumulative effects upon neighborhood aesthetics and residential property values.

Section 4: The proposed commercial use of the antennae and the tower is contrary to the City's General Plan, which contains the following goals and policies:

> *It is the goal of the City of Rancho Palos Verdes to preserve and enhance the community's quality living environment; to enhance the visual character and physical quality of existing neighborhoods; and to encourage the development of housing in a manner which adequately serves the needs of all present and*

future residents of the community. [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]

The City shall discourage industrial and major commercial activities due to the terrain and environmental characteristics of the City. Commercial development shall be carefully and strictly controlled, and limited to consideration of convenience or neighborhood service facilities. [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]

It shall be a goal of the City to ensure adequate public utilities and communications services to all residents, while maintaining the quality of the environment. [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Goals (p. 100)]

> *Require adequate landscaping or buffering techniques for all new and existing facilities and networks, in order to reduce the visual impacts of many infrastructure facilities and networks.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Policy No. 8 (p. 138)]

Although these goals and policies acknowledge the need for commercial development and the provision of communications services for the City's residents, they also call upon the City to balance these community needs with the preservation of the quality of the City's residential neighborhoods. The City has attempted to balance these objectives by encouraging the installation of commercial antennae in non-single-family residential areas, and the utilization of screening techniques to camouflage the appearance of commercial antennae to the maximum extent practicable, especially in residential zones. As a result, most commercial antennae previously approved by the City have been proposed for properties that are not zoned or used for single-family

residential purposes, or have employed screening techniques to fully (or at least partially) mask the appearance of the antennae.

As is discussed in the Staff report that was prepared for the July 5, 2000 City Council meeting, the City has approved two conditional use permits for the construction of antennae in residential zones which are being used for commercial transmissions. In both cases, the antennae were located in a manner that was unobtrusive and did not cause adverse visual and aesthetic impacts upon surrounding residential properties.

In this case, the subject property and surrounding neighborhood are designated Residential, 1-2 DU/acre in the City's General Plan, which is a land use designation intended to accommodate low-density neighborhoods of detached, single-family homes and related accessory uses and structures. The use of the existing antenna support structure and array for amateur purposes is an accessory use to the primary use of the property as a single-family residence, but the proposed commercial use of some of the existing antennae constitutes an intensification of the use of the tower such that the use of the antenna support structure and array is no longer clearly subordinate to the primary permitted use of the subject property. Because this application involves approval of the commercial use of the antennae, which previously was conducted in violation of the Municipal Code, it cannot be determined with certainty how many of the existing antennae were placed on the site for the commercial use and how many were used solely for amateur purposes in accordance with the prior City approval. In addition, unlike the other two antenna structures that were approved for commercial use in residential areas, the size and configuration of the current site and the close proximity of the tower to surrounding residences provides little or no opportunity for effective visual screening and buffering of the tower, which is inconsistent with the General Plan goals and policies discussed in this section.

Section 5: There is at least one, and may be additional locations within the City that can accommodate the applicant's proposed commercial transmissions. The applicant has testified that although he currently is using a private structure located at the FAA's San Pedro Hill site, that site is no longer available to him, because the operator of the area where the commercial antennae are located has asked him to remove his equipment. Mr. Abrams also testified that the County of Los Angeles' antenna site on Crestridge Road is not available to him. Mr. Abrams claims that these are the most technically optimal locations to which he could relocate his existing facilities.

Mr. Abrams initially testified that the location at 44 Oceanaire Drive is the only location in the City that is available for his commercial use. He later testified that there are other locations in the City where he could locate his commercial antenna equipment, but that it would be cost-prohibitive for him to do so, due to the additional height of the antenna support structure that would be needed. He stated that there is no location within the City, including the subject site, that would provide the ability to transmit to all areas of the City and the Palos Verdes Peninsula, because the topography of the area prevents complete coverage from any one location. He submitted evidence that there are several locations where he could actually improve the coverage of his transmissions, if an antenna support structure of approximately two hundred feet or more were constructed. Mr. Abrams did not present testimony regarding the height of the antenna structures that would be required at the other locations in order to duplicate the degree of coverage that he presently has at the subject property.

The City requested that its expert, Dr. Richter, conduct studies of several different sites within the City to determine if any of the sites could be used by the applicant in place of the current location at 44 Oceanaire Drive. Dr. Richter ran

propagation studies from Mr. Abrams' property and from four other properties in the City. Dr. Richter's studies demonstrated that there is at least one alternative site in the City, at the St. John Fisher Church, located on Crest Road, where the applicant's ability to transmit would be increased above the level of coverage from the Oceanaire Drive site, if an eighty-foot antenna support structure were constructed. Dr. Richter disagrees with the conclusions of Mr. Abrams' expert that a 200-foot antenna would be required at the church site in order to have adequate coverage and has concluded that an eighty-foot antenna would provide adequate transmission coverage on the south side of the Palos Verdes Peninsula and would provide improved coverage to the north. It is the opinion of City Staff that if an eighty-foot antenna were located on the church property, it probably would not require a setback variance or demolition of existing structures.

The pastor of the St. John Fisher Church submitted a letter to the City, dated July 3, 2000, stating that the Church was interested in allowing an antenna support structure on that property, either adjacent to the existing maintenance building or incorporated within a structure that is designed as a church bell tower. Mr. Abrams testified that he had met with representatives of the church, and that they had indicated a willingness to explore the possible construction of an antenna tower on the church property. Mr. Abrams submitted a copy of a 1956 deed restriction on that site that he alleges will prevent the church property from being used for this purpose. However, the deed restriction states that it expired as of January 1, 1982.

Thus, there is substantial evidence in the record that refutes the applicant's claim that there are no other viable alternate sites available to him, if the current application is denied. Instead, it appears that there is at least one alternate site that could accommodate the applicant's proposed commercial use

that would have fewer or no adverse impacts on surrounding properties than the proposed location at 44 Oceanaire Drive.

Section 6: The proposed project is not consistent with the City's Wireless Communications Antenna Development Guidelines. The site and configuration of the proposed project is located conspicuously on an existing single-family residence. The size and scale of the proposed use suggests that it is not clearly ancillary to the primary permitted use of the site as a single-family residence (Guideline No. 2). Although the Guidelines encourage co-location of comercial antennae on existing towers (Guideline No. 3), the future placement of additional commercial antennae at this site probably would increase the size and/or configuration of the existing antenna structure and would intensify the commercial use of the site, which would not be consistent with the general intent of the Guidelines to balance the need to provide wireless communications coverage with the need to maintain the quality of life for residents. In addition, although the existing tower does not impair protected views, as defined in the City's Development Code, it is highly visible in the neighborhood immediately surrounding the subject property (Guideline No. 4). The approval of the project as currently proposed would disproportionately benefit the applicant's commercial interests, while causing a significant adverse aesthetic impact upon the surrounding residential neighborhood and the general public, resulting in an imbalance of private versus public costs and benefits (Guideline No. 5). Finally, the size and scale of the proposed project and its close proximity to surrounding residents precludes effective visual screening of the existing antenna support structure and array (Guideline No. 9), since the applicant has testified that he is not willing to modify the height or configuration of the existing antenna support structure or the antennae that are located on the structure.

Section 7: The denial of Conditional Use Permit No. 207 is consistent with the local zoning authority reserved to the City of Rancho Palos Verdes by the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)) ("the Act") for the following reasons:

A. The denial of Conditional Use Permit No. 207 "[does] not unreasonably discriminate among providers of functionally equivalent services . . . and [does] not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. 332(c)(7), subsections (B)(i)(I) and (II)), because:

   1. The applicant has admitted that not all of the commercial services that he provides are within the scope of the Act and that no one site within the City, including the site at 44 Oceanaire Drive, can provide complete transmission coverage throughout the entire City or the Palos Verdes Peninsula.

   2. Mr. Abrams has refused to consider reducing the size or configuration of his existing antenna support structure to make it more compatible with the surrounding residential area or to consider transmitting from smaller antennas at multiple locations within the City. Despite his refusal to mitigate the adverse aesthetic impacts of the antenna support structure upon the surrounding residential neighborhood, Mr. Abrams nevertheless erroneously contends that under the Act, he is entitled to commercial use of the structure that he already constructed.

   3. In reviewing all of the applications to provide personal wireless services within the City, the City has applied consistently its regulations to these facilities so as to approve facilities that are

compatible with surrounding uses and to modify or deny applications that will have adverse visual and aesthetic impacts upon surrounding properties. The instant application is being denied because it will result in adverse visual and aesthetic impacts upon adjacent properties, and the applicant has refused to alter the antenna structure to eliminate those impacts. Accordingly, the denial of the proposed project does not unreasonably discriminate between the applicant's project and that of any other service provider.

4. The denial of this specific proposal does not prohibit the applicant from providing wireless communications services because the applicant still has the ability to propose the relocation of these services to another site or sites that meet all of the required findings for approval by the City. The City has previously approved applications for commercial antennae for a variety of commercial wireless services and service providers, including applications for properties that were zoned or used for single-family residential purposes. Accordingly, the denial of this particular application also does not result in a ban or prohibition of, or have the effect of prohibiting, the placement of these types of facilities within the City of Rancho Palos Verdes.

5. The denial of this application does not prohibit or have the effect of prohibiting personal wireless services because Mr. Abrams is able to transmit to a few areas within the City from commercial antennas that are located outside of the City, without the existing antenna at 44 Oceanaire Drive, although he has testified that there will be a significant gap in the coverage he provides if the

application to utilize the Oceanaire property is not approved. (Mr. Abrams testified that there are gaps in coverage even if this application is approved.) In addition, denial of the application to broadcast commercially from 44 Oceanaire does not prevent Mr. Abrams from applying to broadcast commercially from one or more other locations in the City, including from the St. John Fisher church site. Meanwhile, there are cellular antennas and other antennas located within the City that currently provide personal wireless services to the public throughout most of the City and the Palos Verdes Peninsula from facilities that are not causing the adverse visual and aesthetic impacts that will be caused by the instant application.

6. Mr. Abrams' proposal to use the existing antenna tower located at his residence for commercial use is the least expensive, most cost effective means for him to provide commercial service, since he will not have to pay anyone to use a different site that he does not own, and he will be able to charge others who use that location from which to broadcast their commercial signals. Mr. Abrams and his attorneys contend that the City has no discretion under the Act to deny the instant application. However, this interpretation is contrary to the express language of Section 704 of the Act, which allows local governmental entities to make decisions regarding the placement, construction and modification of personal wireless service facilities in accordance with the provisions of the Act. Under the Act, Mr. Abrams is not entitled to the precise height, configuration and location of the antenna support structure that he has designed for the particular technology that he

has chosen to utilize to broadcast commercially, especially since he has refused to modify his existing antenna support structure or the technology that he uses to eliminate the adverse aesthetic impacts upon adjacent properties. Also, the fact that Mr. Abrams received City approval for an amateur radio antenna structure, which was expressly conditioned not to be used for commercial purposes, and then broadcast commercially from his property without having obtained the required conditional use permit from the City, also does not entitle him to approval under the Act or prevent the City from denying the application for a conditional use permit to broadcast commercially.

The application for this Conditional Use Permit was deemed complete by City Staff, on January 31, 2000. The City has acted on both the applicant's request for Conditional Use Permit No. 207 and this appeal "within a reasonable period of time after the request [was] duly filed with [the City], taking into account the nature and scope of such request" (47 U.S.C. 332(c)(7), subsection (B)(ii)). This application and the appeal have been processed by the City in a timely fashion and in accordance with the time lines established by the State Permit Streamlining Act and CEQA, and the Telecommunications Act. Indeed, the most recent delay in adopting this resolution was caused primarily by Mr. Abrams' request to augment the record, which could not have been accomplished without re-noticing and re-opening the public hearing. The timing for providing notice of the hearing to the newspaper required an additional delay of twenty-eight days.

C. The decision to deny the application for Conditional Use Permit No. 207 "[is] in writing and supported by substantial evidence contained in a written record" (47 U.S.C. 332(c)(7), subsection (B)(iii)). This Resolution, along with P.C. Resolution No. 2000-12, the Staff reports prepared for all of the Planning Commission and the City Council meetings, the project plans, all of the correspondence and testimony presented to the Planning Commission and City Council, including, without limitation, the testimony presented at the August 15, 2000 City Council meeting, the additional material submitted by Mr. Abrams, the testimony and reports by the City's expert, Dr. Henry Richter, and by the other interested parties, and the Minutes of both the Planning Commission hearing and these proceedings, all of which are incorporated herein by this reference, provide a written record of the basis for the City Council's decision in this matter.

D. In denying the application for Conditional Use Permit No. 207, the City has not "[regulated] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions (47 U.S.C. 332(c)(7), subsection (B)(iv)). Although radio frequency emission[s] are identified as an environmental effect in the draft Mitigated Negative Declaration prepared for this application, the environmental analysis clearly states that these effects are not significant and are not within the City's purview to consider or regulate. In addition, the City Attorney advised the City Council that the City Council could not consider any environmental effects of emissions that comply with FCC regulations, including purported impacts upon health or alleged interference with television reception. The City

Council has relied upon that advice and the provisions of the Act and, therefore, has not based its decision to deny the proposed project in any respect upon any actual or perceived environmental effects attributable to radio frequency emissions.

Section 8: The draft Mitigated Negative Declaration that was prepared by Staff, in conjunction with Conditional Use Permit No. 207, is not adopted by the City Council because the City Council finds that the approval of the proposed project will result in significant adverse visual and aesthetic impacts upon properties surrounding the project site, both singularly and cumulatively.

Section 9: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure and other applicable short periods of limitation. Pursuant to the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)(B)(v)) any person adversely affected by the City's final action in this matter may, within thirty (30) days after such action, commence an action in any court of competent jurisdiction.

Section 10: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, the City Council of the City of Rancho Palos Verdes hereby denies, with prejudice, Conditional Use Permit No. 207 for the proposed commercial use of existing antennae on an existing antenna support structure and array located at 44 Oceanaire Drive in the *Del Cerro* neighborhood. However, this denial is without prejudice to Mr. Abrams's ability to file an application for a conditional use permit to transmit commercially at another location in the City.

PASSED, APPROVED, AND ADOPTED this 15th day of August 2000.

/s/ LEE BYRD
MAYOR

ATTEST:

/s/ JO PURCELL
CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, JO PURCELL, City Clerk of the City of Rancho Palos Verdes, do hereby certify that the above Resolution No. 2000-53 was duly and regularly passed and adopted by the said City Council at a regular meeting thereof held on August 15, 2000.

_____
City Clerk
City of Rancho Palos Verdes

APPENDIX E

P.C. RESOLUTION NO. 2000-12

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF RANCHO PALOS VERDES DENYING WITH PREJUDICE CONDITIONAL USE PERMIT NO. 207 FOR THE PROPOSED COMMERCIAL USE OF EXISTING ANTENNAE ON AN EXISTING ANTENNA SUPPORT STRUCTURE, LOCATED AT 44 OCEANAIRE DRIVE IN THE *DEL CERRO* NEIGHBORHOOD

WHEREAS, on January 8, 1990, the applicant, Mark Abrams, received approval of an application for Site Plan Review No. 5322 to permit the construction of a 40-foot-tall amateur radio antenna support structure and array on his property at 44 Oceanaire Drive in the *Del Cerro* neighborhood; and

WHEREAS, on January 19, 1998, Mr. Abrams received approval of an application for Site Plan Review No. 8017 to permit the construction of a second, similar amateur radio antenna support structure and array on the same property; and

WHEREAS, on January 20, 1998, the City's approval of Site Plan Review No. 8017 was appealed to the Planning Commission by Karyl Newton, the owner of the adjacent property at 46 Oceanaire Drive; and

WHEREAS, at a duly noticed public hearing on the appeal of Site Plan Review No. 8017, Mr. Abrams admitted that there was at least one antenna on the existing support structure and array that was used for commercial purposes, and evidence was also presented to the Planning Commission which purported to confirm this commercial use and demonstrated that the existing antenna support structure and array was taller than forty feet (40'0"); and

WHEREAS, the Planning Commission's consideration of the appeal of Site Plan Review No. 8017 was continued to a date certain, was subsequently tabled by the imposition of a moratorium on applications for second antenna support structures, and was ultimately voided by the enactment of revisions to the City's antenna regulations; and

WHEREAS, the City investigated the allegations regarding the height of the existing antenna support structure and array and found that Building Permit No. 9827 had been erroneously issued and finaled in 1990 to allow the antenna support structure and array to exceed the 40-foot height limit; and

WHEREAS, the City investigated the allegations regarding commercial use of the existing antennae and found that they were valid. Subsequently, on June 29, 1999, the Los Angeles County Superior Court granted the City's motion for a preliminary injunction, and on September 13, 1999, the court issued its written order, preventing Mr. Abrams from using the antennae for commercial purposes unless and until the City approved a conditional use permit for the use; and

WHEREAS, on July 12, 1999, September 20, 1999 and January 21, 2000, Mr. Abrams submitted applications and supplemental information for Conditional Use Permit No. 207 and Environmental Assessment No. 720 to allow the commercial use of certain of the existing antennae on the existing antenna support structure on his property in the *Del Cerro* neighborhood; and

WHEREAS, on January 31, 2000, the applications for Conditional Use Permit No. 207 and Environmental Assessment No. 720 were deemed complete by Staff; and

WHEREAS, pursuant to the provisions of the California Environmental Quality Act, Public Resources Code Sections 21000 *et seq.* ("CEQA"), the State's CEQA Guidelines, California Code of Regulations, Title 14, Section 15000

et seq., the City's Local CEQA Guidelines, and Government Code Section 65962.5(f) (Hazardous Waste and Substances Statement), the City of Rancho Palos Verdes prepared an Initial Study and determined that the approval of Conditional Use Permit No. 207 could result in a significant adverse effect upon the environment unless mitigation measures were applied and, therefore, a draft Mitigated Negative Declaration has been prepared and notice of same was given in the manner required by law; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code and the State CEQA Guidelines, the Planning Commission held a duly noticed public hearing on April 25, 2000 and May 9, 2000, at which time all interested parties were given an opportunity to be heard and present evidence;

NOW, THEREFORE, THE PLANNING COMMISSION OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The site is not adequate in size and shape to accommodate the proposed use because Sections 17.76.020(A)(5) and 17.76.020(A)(8) of the Rancho Palos Verdes Development Code require that the proposed commercial use "have the least visual impact on the environment" and provide landscaping and screening to "screen and buffer towers, accessory uses and stored equipment," respectively, but the existing tower is sited and designed to take maximum advantage of the elevation and topography, and not to minimize its visual impacts. If the subject property were larger so that the tower was located further from adjacent residences and rights-of-way the increased distance might have the effect of screening and buffering the visual impacts of the existing tower. Attempting to screen the existing tower and antennae with foliage would not be effective because most surrounding

properties are at the same elevation or only slightly higher than the subject property. Therefore, given the constraints of the subject property, it is not reasonably possible to reduce the visual impacts of the existing tower without modifying its height, location and/or configuration.

Section 2: The approval of the subject commercial use at this specific location will result in significant adverse effects on adjacent property or the permitted use thereof because the commercial use of some of the antennae constitutes an intensification of the use of the antennae, and this intensification of use financially benefits the applicant and his business while causing negative visual impacts from the location, height and size of the antenna tower upon surrounding residential properties. Currently, the tower is visually prominent within the neighborhood and although reducing the height of certain elements of the structure might somewhat improve the appearance of the antenna array, it would not eliminate the negative visual aspects of the tower related to its height, close proximity to surrounding residences and lack of screening or buffers. Therefore, although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood. In addition to the visual impacts of the existing antennae tower, the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects. Such proposals are likely—given the neighborhood's elevation, topography and unique geographic setting—and would have significant adverse cumulative effects upon neighborhood aesthetics and residential property values.

Section 3: The proposed use is contrary to the General Plan, which contains the following goals and policies:

> *It is the goal of the City of Rancho Palos Verdes to preserve and enhance the community's quality living environment; to enhance the visual character and physical quality of existing neighborhoods; and to encourage the development of housing in a manner which adequately serves the needs of all present and future residents of the community.* [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]
>
> *The City shall discourage industrial and major commercial activities due to the terrain and environmental characteristics of the City. Commercial development shall be carefully and strictly controlled, and limited to consideration of convenience or neighborhood service facilities.* [Rancho Palos Verdes General Plan Urban Environment Element, Activity Area Goals (p. 56)]
>
> *It shall be a goal of the City to ensure adequate public utilities and communications services to all residents, while maintaining the quality of the environment.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Goals (p. 100)]
>
> *Require adequate landscaping or buffering techniques for all new and existing facilities and networks, in order to reduce the visual impacts of many infrastructure facilities and networks.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Policy No. 8 (p. 138)]

Although these goals and policies acknowledge the need for commercial development and the provision of communications services for the City's residents, they also call upon the City to balance these community needs with the preservation of the quality of the City's residential neighborhoods. The City has attempted to balance these objectives by encouraging the installation of commercial antennae in non-single-family residential areas, and the utilization of screening techniques to camouflage the appearance of commercial antennae to the maximum extent practicable. As a result, most commercial antennae previously approved by the City have been proposed for properties that are not zoned or used for single-family residential purposes, and have employed screening techniques to fully (or at least partially) mask the appearance of the antennae. In this case, the subject property and surrounding neighborhood are designated Residential, 1-2 DU/acre in the City's General Plan, which is a land use designation intended to accommodate low-density neighborhoods of detached, single-family homes and related accessory uses and structures. The use of the existing antenna support structure and array for amateur purposes is an accessory use to the primary use of the property as a single-family residence, but the proposed commercial use of some of the existing antennae constitutes an intensification of the use of the tower such that the use of the antenna support structure and array is no longer clearly subordinate to the primary permitted use of the subject property. Because this application involves approval of the commercial use of the antennae, which previously was conducted in violation of the Municipal Code, it cannot be determined with certainty how many of the existing antennae were placed on the site for the commercial use and how many were used solely for amateur purposes in accordance with the prior City approvals. In addition, the size of the site and the close proximity of the tower to surrounding residences provide[] little or no opportunity for effective visual screening and buffering of the tower, which is inconsistent with the General Plan goals and policies discussed in this section.

Section 4: There may be other locations and antenna towers that can accommodate the applicant's proposed commercial transmissions. The applicant has provided evidence

that the FAA's San Pedro Hill site and the County of Los Angeles' antenna site on Crestridge Road are not available to him, and he claims that these are the most technically optimal locations to which he could relocate his facilities. Aside from these two locations, however, the applicant has not provided evidence to support his claim that there are no other viable sites available to him, even if these other sites are less than technically optimal in terms of their use for commercial radio purposes. As such, there may be alternate sites available for the applicant's proposed use that would have fewer or no adverse impacts on surrounding properties than the proposed location at 44 Oceanaire Drive does.

Section 5: The proposed project is not consistent with the City's Wireless Communications Antenna Development Guidelines. The site of the proposed project is a single-family residence, which is not consistent with the Commission's preference for the use of non-single-family structures and properties as antenna sites, and the size and scale of the proposed use suggests that it is not clearly ancillary to the primary permitted use of the site as a single-family residence (Guideline No. 2). Although the Guidelines encourage co-location of commercial antennae on existing towers (Guideline No. 3), the future placement of additional commercial antennae at this site would not be consistent with the general intent of the Guidelines to balance the need to provide wireless communications coverage with the need to maintain the quality of life for residents. In addition, although the existing tower does not impair protected views, as defined in the City's Development Code, it is highly visible in the neighborhood immediately surrounding the subject property (Guideline No. 4). The approval of the project as currently proposed would disproportionately benefit the applicant, at a significant adverse aesthetic expense to the surrounding residential neighborhood and the general public, resulting in an imbalance of private versus public costs and benefits (Guideline No. 5). Finally, the size and scale of the proposed

project and its close proximity to surrounding residents precludes effective visual screening of the existing antenna support structure and array (Guideline No. 9).

Section 6: The denial of Conditional Use Permit No. 207 is consistent with the local zoning authority reserved to the City of Rancho Palos Verdes by the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)) for the following reasons:

A. The denial of Conditional Use Permit No. 207 "[does] not unreasonably discriminate among providers of functionally equivalent services . . . and [does] not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. 332(c)(7), subsections (B)(i)(I) and (II)). There are no "competing" applications for the applicant's proposed services at this site, so the denial of the proposed project cannot be said to discriminate between the applicant's project and that of any other service provider. In addition, the denial of this specific proposal does not prohibit the provision of wireless communications services because the applicant still has the ability to propose the relocation of these services to another site that meets all of the required findings for approval by the City. While the City has previously approved applications for commercial antennae for a variety of wireless services and service providers, these applications have generally been proposed for properties that were not zoned or used for single-family residential purposes.

B. The application for this Conditional Use Permit was deemed complete by City Staff, on January 31, 2000. The City has acted on the applicant's request for Conditional Use Permit No. 207 "within a reasonable period of time after the request [was] duly filed with [the City], taking into account the nature and scope of such request" (47 U.S.C. 332(c)(7), subsection (B)(ii)). This application has been processed by the City in a timely

fashion and in accordance with the time lines established by the State Permit Streamlining Act and CEQA.

C. The decision to deny the application for Conditional Use Permit No. 207 "[is] in writing and supported by substantial evidence contained in a written record" (47 U.S.C. 332(c)(7), subsection (B)(iii)). This Resolution, along with the Staff report, plans, public correspondence and the Minutes of these proceedings, all of which are incorporated herein by this reference, provides a written record of the basis for the Planning Commission's decision in this matter.

D. In denying the application for Conditional Use Permit No. 207, the City has not "[regulated] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions" (47 U.S.C. 332(c)(7), subsection (B)(iv)). Although radio frequency emission[s] are identified as an environmental effect in the draft Mitigated Negative Declaration prepared for this application, the environmental analysis clearly states that these effects are not significant and not within the City's purview to consider or regulate. Therefore, the Planning Commission's denial of the proposed project is not based in any way upon any actual or perceived environmental effects attributable to radio frequency emissions.

Section 7: The draft Mitigated Negative Declaration that was prepared by Staff, in conjunction with Conditional Use Permit No. 207, is not adopted by the Planning Commission because the Planning Commission finds that the approval of the proposed project will result in significant adverse visual and aesthetic impacts upon properties surrounding the project site, both singularly and cumulatively.

Section 8: Any interested person aggrieved by this decision or by any portion of this decision may appeal to the City Council. Pursuant to Section 17.60.060 of the Rancho Palos Verdes Municipal Code, any such appeal must be filed with the City, in writing, and with the appropriate appeal fee, no later than fifteen (15) days following May 9, 2000, the date of the Planning Commission's final action.

Section 9: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, the Planning Commission of the City of Rancho Palos Verdes hereby denies, with prejudice, Conditional Use Permit No. 207 for the proposed commercial use of existing antennae on an existing antenna support structure and array located at 44 Oceanaire Drive in the *Del Cerro* neighborhood.

PASSED, APPROVED, AND ADOPTED this 9th day of May 2000, by the following vote:

AYES:	Chairman Lyon, Vice Chairman Clark, Commissioners Cartwright, Long, Mueller, Paulson and Vannorsdall
NOES:	none
ABSTENTIONS:	none
ABSENT:	none

/S/ Frank Lyon
Frank Lyon
Chairman

/S/ Joel Rojas
Joel Rojas, AICP
Director of Planning Building
and Code Enforcement; and, Secretary
to the Planning Commission

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55681

MARK J. ABRAMS,
Plaintiff-Appellant,

v.

CITY OF RANCHO PALOS VERDES, a municipality;
City of Rancho Palos Verdes City Council,
Defendants-Appellees,

AND

FRANK LYON; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS W. STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND LARRY CLARK,
Defendants.

Filed: Mar. 16, 2004

D.C. No. CV-00-09071-SVW

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI,* Judge.

The petition for rehearing and the petition for rehearing en banc are DENIED.

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

APPENDIX G

1. The Communications Act of 1934, as amended by Pub. L. No. 97-259, § 120(a), 96 Stat. 1096, by Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 1093, and by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 151, codified as 47 U.S.C. § 332, provides in relevant part:

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing

of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of

this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any

reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing ir this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

2. Section 601 of the Telecommunications Act of 1996, 110 Stat. 143, codified as 47 U.S.C. 152 note, provides in relevant part:

Applicability of Consent Decrees and Other Law

* * * * *

(b) Antitrust laws.—

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

* * * * *

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

3. Section 1983 of Title 42 of the United States Code provides, in relevant part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Section 1988 of Title 42 of the United States Code provides, in relevant part:

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity

such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX H



(3)

No. 03-1601

Supreme Court, U.S.
FILED
JUL 1 - 2004
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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Ninth Circuit's holding that Petitioners failed to rebut the presumption in favor of the availability of § 1983 monetary remedies to a person deprived of federal rights guaranteed by the Telecommunications Act of 1996, where the private right of action in Section 332(c)(7)(B)(v) of the Act provides only for a 30-day limitations period and a right to expedited judicial review, and where the case is on remand to the district court for a determination of the appropriate damages remedy?

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IN THE

Supreme Court of the United States

No. 03-1601

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Section 704(c)(7)(B)(v) of the Telecommunications Act of 1996 ("TCA"), codified at 47 U.S.C. § 332(c)(7)(B)(v), allows a person (here, Respondent Mark J. Abrams ("Abrams")) claiming a violation by a state or local government of certain provisions of the TCA affecting wireless communications facilities to file an action in court. The statute requires filing "within 30 days" of the claimed violation, and further provides that the reviewing court "shall hear and decide such action on an expedited basis." *Id.* It says nothing about damages, injunctions, attorneys fees or other types of remedies. The United States Court of Appeals for the Ninth Circuit—invoking the presumption repeatedly recognized by this Court in favor of the availability of remedies under 42 U.S.C. § 1983 for violations of federal statutory rights—held that the City of Rancho Palos Verdes failed to overcome the presumption in its attempt to prove that Congress intended to foreclose resort to § 1983 through creation

of a "comprehensive remedial scheme" in the TCA. Petitioners' Appendix ("Pet. App.") at 12a. The Ninth Circuit held, accordingly, that Abrams was entitled to § 1983 damages and remanded to the district court for further proceedings on that issue. *Id.*

Respondent respectfully submits that this Court should not grant review. As a threshold matter, there has been no final judgment because this case is on remand for a determination as to damages. No unusual circumstance is present to cause this Court to depart from its general rule to stay its hand until final judgment has been issued. The decisions from the Third and Seventh Circuits relied upon by Petitioners do not conflict with the decision below to nearly the degree Petitioners assert, and in any event do not warrant the granting of review. As for the merits, the Ninth Circuit's decision is entirely faithful to the language of the TCA, Congressional intent and this Court's precedents, and is plainly correct. Finally, Petitioners' assertion that this case presents a question of pressing national importance is overstated and unpersuasive.

STATEMENT OF THE CASE

In 1996, Congress amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, by enacting the TCA for the purpose of promoting competition, reducing monopolies, and deregulating telecommunications. H.R. Rep. No. 104-204, pt. 1, at 65 (1995).[1] Concerned that zoning decisions by local governments were unreasonably restricting the growth of (and competition among) cellular telephone and other personal wireless services, Congress sought to strike a balance in Section 704 of the TCA between preservation of local authority over antenna tower siting and similar zoning issues,

[1] "The primary purpose [of the TCA] . . . is to increase competition in telecommunications markets and to provide for an orderly transition from a regulated market to a competitive and deregulated market." *Id.* at 68.

and promotion of competitive telecommunications services. Accordingly, in § 332(c)(7), captioned "Preservation of local zoning authority," Congress placed limits on, but did not entirely preempt, the authority of local governments over the construction and siting of wireless facilities.

Among other limitations, Congress required state and local government decisions denying requests for land use permits for wireless service facilities to be "in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). As an additional limitation on the zoning authority of local governments, a personal wireless service provider claiming a violation of the requirements of § 332(c)(7)(B) may file suit in court under the expedited review provisions of § 332(c)(7)(B)(v), subject to a 30-day statute of limitations. As previously noted, the statute is entirely silent as to the type or scope of remedy that the reviewing court may consider as relief for proof of a violation.[2]

As the Ninth Circuit observed, Pet. App. at 3a, § 1983 is a remedial provision. It provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action

[2] A claimant may also petition the Federal Communications Commission ("FCC") for relief under § 332(c)(7)(B)(v), but this administrative remedy is restricted to claims that the challenged zoning decision was improperly based on alleged "environmental effects of radio frequency emissions" under § 332(c)(7)(B)(iv). The Conference Report discussing § 332 stressed the intent of Congress to foreclose all administrative remedies for claimed violations of the TCA except in the limited circumstance of a claimed violation of clause (iv). H.R. Conf. Rep. No. 104-458, at 208 (1996).

> at law, suit in equity or other proper proceeding for redress . . . .

42 U.S.C. § 1983. To obtain remedies pursuant to § 1983, a plaintiff must first establish a federal "right." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). A plaintiff who satisfies the initial burden of proving entitlement to a federal statutory right creates a rebuttable presumption of a right to § 1983 remedies. *Id.* at 341; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). It is undisputed that the TCA grants enforceable "rights." Pet. App. at 4a. It is also undisputed that the City has violated Abrams' rights under the TCA.[3]

Abrams is an amateur radio operator who is also engaged professionally in the provision of personal wireless services (which includes commercial, mobile radio services). His amateur radio station is located at his residence within the municipality of Petitioner Rancho Palos Verdes, California (the "City"). Pet. App. at 2a, 22a-23a. He is licensed by the FCC for both amateur operation and the provision of personal wireless services. Pet. App. at 2a, 22a; Court of Appeals Supplemental Excerpts of Record ("C.A. Supp. E.R.") C.A. Supp. E.R. at 008. Abrams' home is located high on a mountain ridge, a key location for receiving and sending radio signals to the Los Angeles basin and other coastal areas. C.A. Supp. E.R. at 010. For several years, Abrams and the City have been engaged in various disputes regarding the construction and use of radio antennae on Abrams' property. *See generally* Certified Administrative Record ("Admin. R.") at 01-1678 (Vols. 1-6). These disputes resulted in litigation in both the state and federal courts, in which Abrams' position has been largely upheld. *City of Rancho Palos*

[3] The City initially filed an appeal from the district court's holding dated January 9, 2002, but withdrew that appeal after the Court of Appeals of California, Second Appellate District issued its decision dated August 20, 2002 in *City of Rancho Palos Verdes v. Abrams*.

Verdes v. Abrams, 101 Cal. App. 4th 367, 370, 124 Cal. Rptr. 2d 80, 82 (Ct. App. 2002); Pet. App. at 24a.

In 1990, the City issued Abrams a permit to construct an antenna on his property for his amateur use—that is, for passive reception and retransmission of messages on frequencies designated as "amateur." Pet. App. at 22a, 54a. Several years later, the City took exception to the height of the antenna constructed by Abrams, and, in 1998, claimed for the first time that Abrams was using his antenna for what the City termed "commercial purposes" (*i.e.*, use of frequencies designated by the City as "commercial") in violation of the City's permit. *Id.* at 54a. Abrams denied that the City had any basis for its claims, asserting that the FCC had exclusive authority to regulate the radio frequencies that his antenna received and transmitted. Admin. R. at 340-49. In April 1999, the City initiated suit against Abrams in Los Angeles Superior Court, which issued a preliminary injunction in September 1999, and a permanent injunction in May 2001, preventing Abrams from using his antenna for commercial use unless and until he obtained a Conditional Use Permit ("CUP"). Pet. App. at 23a, 55a.

Abrams appealed. On August 20, 2002, the Court of Appeals of California, Second Appellate District, reversed the Superior Court and overturned the injunction, holding that the City's claimed authority to regulate Abrams' use of his antenna for commercial purposes was preempted by the FCC's exclusive jurisdiction over radio communications and its comprehensive licensing scheme. *Abrams*, 101 Cal. App. 4th at 370, 124 Cal. Rptr. at 82.

Although Abrams disputed the City's claimed jurisdiction over the commercial use of his wireless facilities, Abrams nevertheless complied with the suggestion of the Superior Court judge that he apply for a CUP as a means of resolving the issue. Pet. App. at 23a. Abrams did so in July 1999, shortly after the City filed its state court action. Admin. R. at

16-39. His application stressed that the addition of certain radio frequencies (allowing use for commercial purposes) to the amateur radio frequency allocations would not involve any change, addition or modification whatsoever to the existing antenna facilities, Abrams' home, or the surrounding area. *Id.* at 17-18. More than a year later, and after repeated requests for additional information, in August 2000 the City eventually denied Abrams' CUP application. *Id.* at 43-46, 72-75, 101, 945-51; C.A. Supp. E.R. at 013.

On August 24, 2000—within the 30-day statute of limitations specified in the TCA—Abrams filed this action in the U.S. District Court for the Central District of California, alleging that the City's denial of his CUP application violated the TCA. C.A. E.R. at 1-2. Abrams also claimed a right to damages under 42 U.S.C. § 1983 and to attorneys fees under 42 U.S.C. § 1988. *Id.* at 14-15. Approximately 17 months later, in its order dated January 9, 2002, the district court agreed with Abrams that the City had violated the TCA. The court held that the City's decision to reject Abrams' CUP application to add passive reception and retransmission of certain radio frequencies via an existing, unmodified antenna structure was not supported by substantial evidence as required by § 332(c)(7)(B)(iii). Pet. App. at 18a-26a. The district court remanded the matter to the City Council, ordering the City to grant Abrams a CUP subject to reasonable conditions. *Id.* at 14a. In its Judgment of Injunction dated March 18, 2002, the court denied Abrams' request for § 1983 remedies, stating only that the TCA subsumed such remedies. Pet. App. at 14a-15a. The court also denied Abrams' corresponding request for § 1988 relief. *Id.* at 15a.

Abrams appealed the issue of §§ 1983 and 1988 relief to the Ninth Circuit. The City did not pursue an appeal of the district court's decision that the City had violated Abrams' rights under the TCA. The Ninth Circuit reversed as to the

§ 1983 issue.[4] Pet. App. at 1a-12a (T.G. Nelson, joined by Kozinski, J. and the Hon. Jane A. Restani, U.S. Ct. of Int'l Trade, by designation).

The Ninth Circuit began its analysis by stressing the "rebuttable presumption" in favor of § 1983 remedies established by this Court in *Blessing*. Pet. App. at 3a-4a. The court then noted that it was undisputed that the TCA grants enforceable "rights." *Id.* at 4a. Thus, the court stated, the only question was whether the City could overcome the presumption that Abrams was entitled to § 1983 damages for violation of his TCA rights by proving that Congress, expressly or by implication, foreclosed § 1983 remedies. The court found "no support" in the language of the TCA that Congress expressly foreclosed § 1983. *Id.* Therefore, the court examined the next prong in the analysis required by *Blessing*: whether Congress had impliedly foreclosed § 1983 remedies by creating a comprehensive remedial scheme in the TCA that was incompatible with individual enforcement under § 1983, thereby evincing Congress' intent to "close the door on § 1983 liability." *Id.* at 4a-5a (*quoting Blessing*, 520 U.S. at 348). The court held that the City had not carried its burden.

The Ninth Circuit held that "the statute grants no remedies beyond procedural rights," which "are insufficient for us to conclude that the TCA contains a remedial scheme that closes the door on § 1983 liability." Pet. App. at 6a. The 30-day limitation period, stated the court, is not a "remedy" in any sense because it "imposes a burden on an aggrieved plaintiff, not a benefit." *Id.* at 8a. The only "benefit" identified in the statute by the Ninth Circuit was expedited judicial review, but the court found that to be a procedural mechanism that "does

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[4] The court stated that its holding made it unnecessary to address Abrams' argument that he was entitled to recover attorneys fees under § 1988 for a due process violation. Pet. App. at 12a n.49.

nothing to remedy a TCA violation in itself." *Id.* at 8a-9a. The Ninth Circuit pointed out that: "Significantly, a court can fully comply with all of the TCA's provisions before it determines liability. Thus, the TCA contains *procedural*, rather than *remedial*, provisions." *Id.* at 9a (emphasis in original). The Ninth Circuit explained that the cases (*see, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981)) in which courts have found "that Congress implied its intent to foreclose resort to § 1983 remedies presented remedial schemes more comprehensive than, and thus distinguishable from, the TCA." Pet. App. at 6a.

The Ninth Circuit found no incompatibility between the procedural mechanisms of the TCA and § 1983. Contrary to the Petitioners' repeated gross mischaracterization, Pet. at 24, 28, the Ninth Circuit did *not* rule that the 30-day limitations period or expedited review provisions of the TCA would be inapplicable to a TCA plaintiff claiming § 1983 damages. In fact, the court held just the opposite: "Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time." Pet. App. at 9a.

Finally, the Ninth Circuit—like the Eleventh Circuit in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, *vacated*, 223 F.3d 1324 (11th Cir. 2000), *op. reinstated*, 250 F.3d 1307, *vacated on reh'g en banc*, 260 F.3d 1320 (11th Cir. 2001) —reasoned that the savings clause in § 601(c)(1) of the TCA forbidding the impairment of any federal "law" affirmed Congress' intent not to foreclose § 1983 remedies. Pet. App. at 10a-12a. The Ninth Circuit—departing from the Third Circuit's reasoning in *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3d Cir. 2002)—concluded that the City had failed to rebut the presumption in favor of § 1983

remedies and that the district court should award § 1983 damages, and remanded to the district court. *Id.* at 12a.

On April 16, 2004, the district court stayed all proceedings based on the City's representation that it would seek a writ of certiorari. Respondent's Appendix ("Resp. App.") at 1a. Thus, the district court has not yet issued a final judgment on damages.

REASONS FOR DENYING THE PETITION

I. THERE IS NO NEED FOR THIS COURT TO DEPART FROM ITS USUAL PRACTICE OF AWAITING A FINAL JUDGMENT

Because of the Ninth Circuit's remand to the district court for a determination as to damages, the case before the Court is not final, and thus the petition should be denied.[5] As a general rule, this Court awaits final judgment in the lower courts before exercising its certiorari jurisdiction. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ((Scalia, J., op.) denying certiorari on grounds that district court had not yet determined appropriate remedy as to admission of women to men-only military college); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (because case was on remand for further consideration of issues of contempt and imposition of fines, it was "not yet ripe for review by this Court"); Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18 at 258-61 (8th ed. 2002). The Court generally stays its hand because review prior to final judgment may

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[5] A judgment of liability prior to the award of damages or other relief is plainly not final. *See, e.g., Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (judgment on liability not "final" within meaning of 28 U.S.C. § 1291 "where assessment of damages or awarding of other relief remains to be resolved"); *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 64 (2d Cir. 1999).

prolong litigation unnecessarily and result in piecemeal litigation. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950).

As *Virginia Military Institute* and *Brotherhood* illustrate, the Court's usual practice of awaiting final judgment prior to review applies to cases in which the circuit court remanded to the district court for further action related to remedies. Even in *Virginia Military Institute*—a highly visible case involving constitutional and cultural issues of unquestionable national importance—the Court adhered to the general rule regarding finality. In the opinion accompanying denial of the petition, Justice Scalia stated:

> This present petition . . . seeks our intervention before the litigation below has come to final judgment. The Court of Appeals . . . remanded the case to the District Court for determination of an appropriate remedy. . . . We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. . . . I think it is prudent to take that course here.

508 U.S. at 946.

The Court on occasion grants certiorari in the absence of a final judgment when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause,"[6] or if resolution of the issue is "'fundamental to the further conduct of the case.'"[7] Those exceptions are clearly

[6] Stern *et al.*, *supra*, § 4.18 at 258 (*citing American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) for this proposition).

[7] *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (*quoting United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)). For example, in *General Motors*, the Court found that it was fundamental to the further conduct of the case to review a case on remand when the core issue concerned the proper interpretation of the takings clause of the Fifth Amendment. 323 U.S. at 377. Resolution of the meaning of "taken" and "just compensation" was "fundamental" prior to further proceedings at trial in the district court. *Id.*

not present here. This case is on remand to the district court for a routine damages determination – a function squarely within the province of the trial court. Moreover, the narrow dispute over remedies, exclusively financial in nature, may resolve itself without further judicial intervention. There is simply no need for this Court to insert itself in this dispute before the abstract question of a right to damages is expressed in a concrete and final form.

The Court also, on occasion, agrees to review non-final judgments when a circuit split is of sufficient importance to warrant this Court's departure from its general rule in favor of finality.[8] As discussed below, that exception also does not apply to this case and is not a sufficient reason for the Court to grant certiorari here.

II. THE CIRCUIT SPLIT DOES NOT WARRANT THE GRANTING OF REVIEW AT THIS TIME

Petitioners have substantially overstated the depth and breadth of the circuit split regarding the compatibility of § 1983 with the TCA.

In a strenuous effort to paint a picture of conflict between the TCA and § 1983 when there is none, Petitioners grossly mischaracterize the Ninth Circuit's holding and draw a false contrast between it and the Third Circuit's opinion in *Nextel*. After discussing the short limitations period and expedited judicial review features of the TCA, Petitioners state: "The Ninth Circuit's decision to allow tower-siting claims to be asserted under Section 1983—*without required expedition and subject to a four-year limitations period* [–] fatally undermines that carefully crafted scheme." Pet. at 24 (citations omitted; emphasis supplied).[9] Petitioners then quote from

[8] *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916); Stern *et al.*, *supra*, § 4.18 at 260.

[9] Petitioners repeat this characterization later in their brief to support their argument that the Ninth Circuit's decision, if allowed to stand, will

Nextel to the effect that allowing a TCA plaintiff seeking § 1983 relief to bypass the limitations and judicial review provisions of § 332(c)(7)(B)(v) would indeed be incompatible with the TCA. *Id.* (*quoting and discussing Nextel*, 286 F.3d at 695). But, as previously noted, the Ninth Circuit held precisely the opposite—that a TCA plaintiff seeking § 1983 remedies *would be* subject to the 30-day limitation period and *would be* entitled to expedited judicial review under the TCA.[10] The Ninth Circuit's analysis in that regard was a central reason why it found no conflict between the procedural provisions of the TCA and the remedies available under § 1983. Pet. App. at 9a.[11] *A fortiori*, the so-called "conflict" that Petitioners attempt to create between the Third and Ninth Circuits on this point is illusory.

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open the floodgates to litigation: "And the lure of damages and attorney's fees, *as well as the ability to avoid the Communications Act's short limitations period*, all but guarantee that the resulting lawsuits will, absent this Court's intervention, include Section 1983 claims with increasing frequency." Pet. at 28 (emphasis supplied).

[10] It is instructive that, while Abrams complied with the 30-day filing deadline in asserting his TCA and § 1983 claims in the district court below, the plaintiff in *Nextel* did not. *Nextel*, 286 F.3d at 691.

[11] The Ninth Circuit's full discussion of the point was as follows:

> Second, the TCA's provisions are compatible with § 1983's remedies. As we said, the TCA's provisions are procedural in nature—not remedial. Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time. Were we to consider the TCA's procedural provisions sufficiently comprehensive to foreclose § 1983 remedies, we would prevent Congress from ever providing statutes of limitations or other procedural provisions without also defining specific remedies. Such a holding would unnecessarily limit § 1983 remedies to those generic statutes that grant a right and nothing else. We decline to take that path. The TCA's procedural provisions are compatible with § 1983's remedial provisions.

Pet. App. at 9a.

The conflict claimed by Petitioners between the Third and Ninth Circuits is more apparent than real for another reason: the statements in *Nextel* regarding the availability of § 1983 remedies to TCA plaintiffs are dicta. Before reaching the § 1983 issue, the Third Circuit first held that the appellant (Nextel Partners Inc.) did not have an actionable claim against the local government for violation of the TCA.[12] Because appellant had not established a substantive TCA violation entitling it to relief under any theory, there was no reason for the Third Circuit to reach the § 1983 issue. That is because, as previously discussed, a plaintiff claiming entitlement to relief under § 1983 must first establish a violation of his federal "rights." *Blessing*, 520 U.S. at 340. Here, Abrams did that; in *Nextel*, appellant did not. To be sure, the Third Circuit in *Nextel* characterized its pronouncements on the interaction between § 1983 and the TCA as a "holding" (and the Ninth Circuit below acquiesced in that characterization, Pet. App. at 8a). But saying so does not make it so. Because it was unnecessary for the Third Circuit to reach the § 1983 issue, its view on that subject is more properly characterized as an advisory opinion. As this Court recently instructed: "We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments, not statements in opinions.'" *Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (citation omitted).

In its analysis of the TCA's savings clause, the Ninth Circuit cited with approval the Eleventh Circuit's vacated opinion in *AT&T Wireless PCS*. Petitioners argue that the Eleventh Circuit case is further evidence of the split in the circuits. Pet. at 19. However, because that decision has been vacated, it is not binding, lessening the circuit split. This

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[12] The court ruled that, because Nextel Partners had not applied for a building permit, there had been no "failure to act" by the local government triggering a violation of § 332(c)(7)(B)(v). The court held, in the alternative, that the TCA claim was moot because the municipal ordinance in question had been amended. 286 F.3d at 692-93.

leaves only two binding circuit opinions in apparent conflict on the narrow issue at bar, the Ninth Circuit's and that of the Seventh Circuit. *PrimeCo Pers. Comms., Ltd. P'Ship v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) ("*Verizon Wireless*").

The Seventh Circuit's decision does not create the type of conflict requiring resolution by this Court. First, it relies on the dicta of the Third Circuit's decision in *Nextel*. *Id.* at 1152. Second, its focus was on the availability of attorneys fees under § 1988 (not § 1983 damages as in the decision below) and associated implications for the "American rule" against award of fees to the prevailing party—an issue not considered by the Ninth Circuit nor raised by the parties below. In this regard, the court made plain that Verizon was seeking an extremely broad holding on the general availability of such fees that the Ninth Circuit's analysis would not support: "Verizon wants us to hold that any time Congress creates a right that is enforceable against state or local officials or agencies, section 1983, and its companion, section 1988, come in the door and the American rule goes out the window." *Id.* The court was also motivated by a public policy concern regarding corporate largesse inapplicable to a case, as here, involving an individual. *Id.* In sum, the circuit split is of less moment than Petitioners claim.

Petitioners also point to a split in views at the district court level, but this factor, in Respondent's view, counsels in favor of denying review. Allowing other courts and circuits to consider the issue, in a variety of factual situations, might lead to a resolution of the split—or, alternatively, to a more clear-cut consensus as to just what the issues are.[13] Of

[13] *See, e.g., Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) ("Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts").

course, a denial of review at this stage does not preclude Petitioners from raising the issue after final judgment. *Virginia Military Inst.*, 508 U.S. at 946.

A final consideration—suggested by language in Petitioners' own brief as well as by the Seventh Circuit's opinion in *Verizon Wireless*—counsels against granting review in this case. Quoting *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992), Petitioners point out that "federal courts adjudicating claims under statutes that create a cause of action but are silent about remedies are presumed to 'have the power to award any appropriate relief.'" Pet. at 22. Similarly, the Seventh Circuit observed in *Verizon Wireless* that "a conferral [of a right to sue to enforce the TCA] is presumed to entitle a successful plaintiff to the usual remedies . . . which include damages as well as injunctive relief." 352 F.3d at 1152-53 (citation omitted).[14] If, as Petitioners imply and the Seventh Circuit ruled, damages are available directly under § 332(c)(7)(B)(v) of the TCA, it is of less than urgent importance for this Court to resolve a circuit split on whether damages are also available via § 1983.

III. THE DECISION BELOW IS PLAINLY CORRECT

Review in this case is also unnecessary because the Ninth Circuit's decision is plainly correct and presents a far more persuasive analysis of the interaction between § 1983 and the TCA than the decisions of the Third and Seventh Circuits.

There is no dispute that the burden lies with the City to overcome the rebuttable presumption in favor of Abrams'

[14] The Third Circuit in *Nextel* declined to decide the question of whether damages are directly available under the TCA. 286 F.3d at 695 n.6. No circuit court of appeals other than the Seventh Circuit has addressed that issue, which is another reason why this Court should stay its hand pending further development of the case law in the lower courts.

entitlement to § 1983 relief. On this score, the Third and Ninth Circuits are in agreement. *See Nextel*, 286 F.3d at 694; Pet. App. at 3a-4a; *see also Gonzaga Univ.*, 536 U.S. at 284. This Court has cautioned that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423–24 (1987) (*quoting Smith v. Robinson*, 468 U.S. 992, 1012 (1984)); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520 (1990). The presumption has been characterized as weighty, requiring a "strong government showing of Congressional intent to foreclose alternative remedies before ruling out a section 1983 claim." *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984).

There can likewise be no dispute that § 332(c)(7)(B)(v) of the TCA does not, on its face, provide for damages, injunctive relief, attorneys fees or the other forms of relief that are universally considered "remedial" in nature. Thus, Petitioners' attack on the decision below is based on the argument that a right to file in court, a right to expedited judicial review, and a severely abbreviated limitations period constitute a "comprehensive remedial scheme" sufficient to overcome the presumption in favor of § 1983. Petitioners are wrong. As the Ninth Circuit correctly held, this is a *procedural* scheme that is fulfilled before the issue of "remedy" is even reached.[15]

The 30-day limitations period requires only the briefest of discussion. Even Petitioners do not take issue with the Ninth Circuit's conclusion that a short limitations period, which "imposes a burden on an aggrieved plaintiff, not a benefit," is

[15] "Procedural law deals with process of getting from right to remedy. . . . For most purposes . . . remedies questions and remedies law are quite distinct from both substance and procedure." 1 Dan B. Dobbs, *Law of Remedies: Damages - Equity - Restitution* § 1.1 at 2 (2d ed. 1993).

not a remedy. Pet. App. at 8a. Therefore, Petitioners' argument rests on the notion that a right to seek judicial review o n an expedited basis is a "comprehensive remedial scheme" trumping the presumption in favor of § 1983. But, as the Ninth Circuit persuasively concluded, "an expedited decision does nothing to remedy a TCA violation in itself." *Id.* at 8a-9a. The Ninth Circuit's characterization of this right as procedural is nothing new. This Court, for example, routinely frames the mechanisms of filing deadlines and expedited judicial review as procedures, not remedies. Last month Justice Breyer explained that "ordinary court *procedural rules and practices* . . . provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to 'accelerate' proceedings." *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, No. 02-1609, 2004 U.S. LEXIS 4026, at *3 (June 7, 2004) (emphasis supplied). Other decisions of this Court are to the same effect. *See, e.g., FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (describing expedited judicial review as a "procedural safeguard"); *Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965) (describing expedited judicial review as a "procedural safeguard"); *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) (describing filing deadline imposed by statute as a "review procedure").[16]

Petitioners' argument that a statutory right to expedited judicial review is "remedial" is further undercut by the discretion retained by the trial court in interpreting and implementing that right, as illustrated by the actual amount of

[16] The legislative history cited by Petitioners, Pet. at 22, cuts against, not in favor of, their argument. The Conference report states that Congress intended § 332(c)(7)(B)(v) to "'provide[] a mechanism for judicial relief.'" *Id.* (citation omitted). "Mechanism" plainly implies that expedited judicial review is procedural, *i.e.*, only a means to obtain an end, and not the ultimate relief itself.

time it takes for TCA litigants to obtain a decision from the courts. A review of the district court TCA cases cited by Petitioners reveals that the average time from filing to receiving a district court decision was approximately 10 months, with several languishing for more than a year.[17] Resp. App. at 2a-5a. Indeed, Abrams' case below took 17 months to decide in the district court—hardly an example of a swift resolution. C.A. E.R. at 1, 116.

Petitioners' argument is hurt, not helped as they claim (Pet. at 22), by the two cases in which this Court has determined that a statutory scheme is sufficiently comprehensive to preclude § 1983 remedies. *Sea Clammers*, 453 U.S. at 20; *Robinson*, 468 U.S. at 1009. The Ninth Circuit discussed *Sea Clammers* at some length. Pet. App. at 6a. In *Sea Clammers*, this Court stated that the statutes at issue had "unusually elaborate enforcement provisions" allowing for civil penalties, litigation costs, injunctive relief, and suspensions or revocations. 453 U.S. at 13-15.[18] In marked contrast, § 332(c)(7)(B)(v) specifies *none* of those remedies.

In *Robinson*, the Court emphasized the "carefully tailored" administrative scheme in the relevant statute, which provided extensive local and state agency relief, followed by judicial review. *Id.* at 1009-11. However, in § 332(c)(7) of the TCA, Congress *eliminated* all administrative remedies except for the extremely limited right to petition the FCC regarding adverse health effects under clause (iv).[19] Where such

[17] This statistic does not encompass time elapsed during appeals and remands.

[18] The Seventh Circuit in *Verizon Wireless* (relied upon so heavily by Petitioners for other purposes) agreed that *Sea Clammers* "is distinguishable because the [TCA] is silent on remedies beyond merely conferring a right to sue to enforce the Act." 352 F.3d at 1152.

[19] The legislative history made clear Congress' intent to restrict nearly all such relevant administrative remedies. "It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act

elaborate and detailed administrative schemes do not exist, the Court has declined to hold that a statute precludes enforcement via § 1983. *Blessing*, 520 U.S. at 347-48.

Finally, the Ninth Circuit's analysis of the TCA's savings clause, which it interpreted to affirm Congress' intent to preserve § 1983 remedies and which it found more sweeping than the savings clauses addressed in *Sea Clammers*, Pet. App. at 10a-12a, is persuasive and provides no basis for questioning the decision. Petitioners cite a collection of provisions from other parts of the Communications Act and the TCA—none targeting wireless communications—specifying various remedies such as criminal and civil fines, prison terms, damages, and attorneys fees in support of their argument that Congress "provided precisely the remedies it considered appropriate . . . and supplant[ed] any remedy that otherwise would be available under § 1983" for violations of the statute. Pet. at 21-22 (*quoting Sea Clammers*, 453 U.S. at 14-15, 20-21). Far from supporting Petitioners' argument, the cited provisions undermine it. First, they list specific remedies such as damages and penalties, in contrast to the unrelated provisions of § 332(c)(7)(B)(v) relating to wireless communications. Second, all of the remedies cited by Petitioners are police power functions or provide for private redress in situations where *non-governmental* persons violate the statute. Section 1983 on its face is inapplicable to non-governmental violations. Congress had to specify remedies in the statute itself to address such matters as prohibitions on telefax spamming (§ 227(b)(1)(C), (3)) and internet communications harmful to minors (§ 231). In stark contrast, § 332(c)(7) provides a private right of action for violations of

of 1934 as amended . . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." H.R. Conf. Rep. No. 104-458, at 208.

the TCA by the *government*—thereby implicating § 1983. Especially in light of the TCA's savings clause, the overall statutory scheme is entirely consistent with the Ninth Circuit's holding that Congress did not intend § 332(c)(7)(B)(v) to supplant the governmental-injury damages provisions of § 1983.

IV. PETITIONERS OVERSTATE THE NATIONAL SIGNIFICANCE OF THIS CASE

The case before the Court is not important enough to warrant granting a writ of certiorari, especially in the face of the Court's general practice against review of cases that are not final. Contrary to Petitioners' contention that "the federal courts are awash with Section 332(c)(7) disputes," Pet. at 26, litigation has dwindled to a mere trickle. An analysis of the 17 federal cases cited by the Petition (*id.* n.7) illustrates the point. Fourteen of these cases were originally filed in the 1990s, when the TCA—enacted in 1996—was new and relatively untested. Resp. App. at 7a-13a. Only three were filed after the year 2000. A more thorough analysis of all reported § 332(c)(7) cases demonstrates that there has been a steep decline in the number of such cases filed in federal district court. In 1997, the year after the TCA was enacted, at least 38 Section 332(c)(7) cases were filed. By contrast, less than 10 were filed in 2003. *Id.* at 17a-18a.

This sharp decline is due to the effectiveness of the TCA. Local governments and telecommunications providers now increasingly work together to avoid disputes under the TCA. "A survey by the American Planning Association, for example, showed that 92 percent of applications for cellular towers were approved by local governments, most within 60 days." Admin. R. at 1054. Rather than turning to the courts, local governments and providers have learned to compromise to accommodate both the needs of providers and the preferences of local communities. *See id.* at 1057-59. Notably,

swift review of such applications is consistent with Congress' core intent in enacting the TCA—the establishment of a seamless, nationwide wireless network. Likewise, the availability of a damages remedy is consistent with Congress' purpose in enacting the TCA of promoting competition and placing limits on local regulation.

Petitioners advance various other reasons why this Court should take this case, having nothing to do with these parties or the Ninth Circuit's holding. For example, they argue that certiorari should be granted because § 332(c)(7) plaintiffs "'are [typically] large telecommunications companies'" faced off against "'small, rural municipalities'" that are not in a good position to defend themselves.[20] Pet. at 15-16 (citations omitted). Petitioners are describing the parties to another case—not this one. They also assert that "the ability to avoid the [TCA's] short limitations period" is an important factor virtually ensuring a flood of new litigation. *Id.* at 28. However, as previously discussed, the Ninth Circuit clearly held that a TCA plaintiff asserting § 1983 damage claims would have to file within the 30-day limitations period prescribed in the TCA—just as Abrams did here.

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[20] The Third Circuit (in a case involving Nextel) and the Seventh Circuit (in a case involving Verizon) made the same point. *Nextel*, 286 F.3d at 695; *Verizon Wireless*, 352 F.3d at 1152.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1, 2004

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Apr 19 2004]

Case No.CV00-9071-SVW(RNBx)

MARK J. ABRAMS

vs.

CITY OF RANCHO PALOS VERDES, *et al.*

CIVIL MINUTES—GENERAL

Present: The Honorable Stephen V. Wilson, *U.S. District Judge*

Paul M. Cruz	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

ATTORNEYS PRESENT FOR PLAINTIFFS: N/A

ATTORNEYS PRESENT FOR DEFENDANTS: N/A

PROCEEDINGS: IN CHAMBERS

Because the Ninth Circuit's ruling in *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004), has created a split in authority between the Ninth Circuit and the Third and Seventh Circuits and because Defendant City of Rancho Palos Verdes accordingly anticipates filing a Petition for a Writ of Certiorari with the United States Supreme Court, the Court hereby stays all proceedings in this matter until the Supreme Court has acted on the City's petition.

APPENDIX B

Expedited Judicial Review of Section 332
District Court Cases Cited in the Petition

The following list of cases appears in the order they were cited in the Petition.

District Court Cases	File Date	Decision Date	Appr. Time Lapse
Abrams v. City of Rancho Palos Verdes, No. 00-CV-09071 (C.D. Cal. 2002)	8/24/2000	1/9/2002	17 mos.
Sprint Spectrum, L.P. v. Town of Ogunquit, 175 F. Supp. 2d 77 (D. Me. 2001)	5/22/2001	12/12/2001	6 ½ mos.
AT & T Wireless PCS, Inc. v. City of Atlanta, 50 F. Supp. 2d 1352 (N.D. Ga. 1999), *vacated*, 210 F.3d 1322, *vacated*, 223 F.3d 1324 (11th Cir. 2000), *op. reinstated*, 250 F.3d 1307, *vacated on reh'g en banc*, 260 F.3d 1320 (11th Cir. 2001)	4/1/1998	6/14/1999	14 ½ mos.
Nextel Comms. of Mid-Atlantic, Inc. v. Town of Randolph, Mass., 193 F. Supp. 2d 311 (D. Mass. 2002)	12/13/2000	3/20/2002	15 mos.
National Telecomm. Advisors, Inc. v. City of Chicopee, 16 F. Supp. 2d 117 (D. Mass. 1998)	10/15/1997	8/11/1998	10 mos.
CIS Comms., L.L.C. v. County of Jefferson, Mo., 222 F. Supp. 2d 1148 (E.D. Mo. 2002)	7/23/2001	10/17/2002	15 mos.
Nextel Partners, Inc. v. Town of Amherst, N.Y., 251 F. Supp. 2d 1187 (W.D.N.Y. 2003)	9/19/2002	3/4/2003	5 ½ mos.

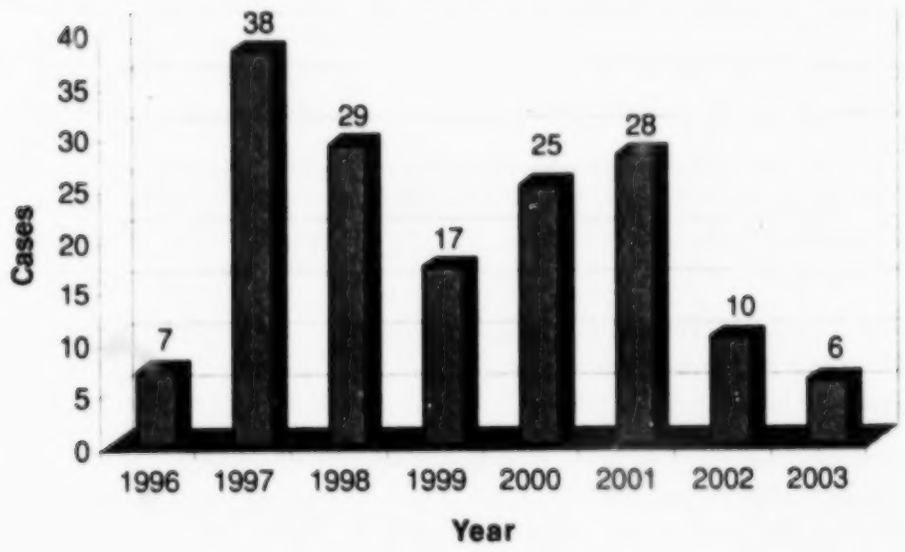
District Court Cases	File Date	Decision Date	Appr. Time Lapse
Omnipoint Holdings, Inc. v. Town of Westford, 206 F. Supp. 2d 166 (D. Mass. 2002)	7/19/2001	6/17/2002	11 mos.
APT Minneapolis, Inc. v. Stillwater Tp., No. 00-2500 JRT/FLN, 2001 WL 1640069 (D. Minn. June 22, 2001)	11/13/2000	6/22/2001	7 mos.
SBA Comms., Inc. v. Zoning Comm'n of Brookfield, 96 F. Supp. 2d 139 (D. Conn. 2000)	1/4/2000	5/1/2000	4 mos.
Smart SMR of N.Y., Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn 1998)	6/30/1997	2/17/1998	7 ½ mos.
Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington, 3 F. Supp. 2d 178 (D. Conn. 1998)	10/8/1997	4/13/1998	6 mos.
Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass. 1997)	2/11/1997	10/6/1997	8 mos.
Nextel Comms. of Mid-Atlantic, Inc. v. Town of Hanson, 311 F. Supp. 2d 142 (D. Mass. 2004)	12/19/2003	3/26/2004	3 mos.
APT Minneapolis, Inc. v. City of Maplewood, No. CIV. 97-2082, 1998 WL 634224 (D. Minn. Aug. 12, 1998)	9/15/1997	8/12/1998	11 mos.
Century Cellunet of S. Mich., Inc. v. City of Ferrysburg, 993 F. Supp. 1072 (W.D. Mich. 1997)	12/6/1996	11/10/1997	11 mos.

District Court Cases	File Date	Decision Date	Appr. Time Lapse
PrimeCo Pers. Comms. Ltd. P'ship v. Lake Cty., Fla., No. 97-208-CIV-OC-10B, 1998 WL 565036 (M.D. Fla. July 20, 1998)	6/27/1997	7/20/1998	13 mos.
Sprint Spectrum L.P. v. Jefferson Cty., 968 F. Supp. 1457 (N.D. Ala. 1997)	6/10/1997	7/31/1997	1 ½ mos.
BellSouth Mobility Inc. v. Gwinnett Cty., Ga., 944 F. Supp. 923 (N.D. Ga. 1996)	5/21/1996	8/13/1996	14 ½ mos.
AT & T Wireless Servs. of Fla., Inc. v. Orange Cty., 982 F. Supp. 856 (M.D. Fla. 1997)	12/12/1996	11/14/1997	11 mos.
Omnipoint Comms. MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108 (D. Mass. 2000)	5/11/1999	8/2/2000	14 ½ mos.
National Tower, LLC v. Frey, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd sub nom. National Tower, LLC v. Plainville Zoning Bd. of Apps.*, 297 F.3d 14 (1st Cir. 2002)	11/20/2000	9/12/2001	10 mos.
Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 24 F. Supp. 2d 359 (D.N.J. 1998), *aff'd in part, rev'd in part*, 197 F.3d 64 (3d Cir. 1999)	7/7/1997	10/28/1998	15 ½ mos.
Virginia Metronet Inc. v. Board of Sup'rs of James City Cty., Va., 984 F. Supp. 966 (E.D. Va. 1998)	7/22/1997	1/15/1998	6 mos.

District Court Cases	File Date	Decision Date	Appr. Time Lapse
Omnipoint Corp. v. Zoning Hr'g Bd. of Pine Grove Tp., 20 F. Supp. 2d 875 (E.D. Pa. 1998), *aff'd*, 181 F.3d 403 (3d Cir. 1999)	11/19/1997	9/16/1998	10 mos.
Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997)	7/3/1996	4/28/1997	9 ½ mos.
PrimeCo Pers. Comms., L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)	11/18/1997	11/19/1998	12 mos.
American Towers, Inc. v. Williams, 146 F. Supp. 2d 27 (D.D.C. 2001), *aff'd*, 50 Fed. Appx. 448 (D.C. Cir. 2002)	10/11/2000	6/14/2001	8 mos.
		Mean:	10 mos.

APPENDIX C

Section 332 District Court Cases By Year of Filing



The district court cases listed in this chart were selected following a Lexis and Westlaw searches for opinions in which a district or appellate court discussed the role of Section 332 in resolving the dispute. Filing dates were determined using a combination of Lexis, Westlaw and Pacer.

Section 332 District Court Cases Per Year

1996 Cases (7 total):

AT & T Wireless Servs. of Fla., Inc. v. Orange Cty., 982 F. Supp. 856 (M.D. Fla. 1997)

BellSouth Mobility Inc. v. Gwinnett Cty., Ga., 944 F. Supp. 923 (N.D. Ga. 1996)

Century Cellunet of S. Mich., Inc.v. City of Ferrysburg, 993 F. Supp. 1072 (W.D. Mich. 1997)

Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997)

In re Appeal of Freeman, 975 F. Supp. 570 (D. Vt. 1997), *aff'd as modified sub nom. Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir.), *cert. denied*, 531 U.S. 917 (2000)

Seattle SMSA Ltd. P'ship v. San Juan Cty., 88 F. Supp. 2d 1128 (W.D. Wash. 1997)

Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997)

1997 Cases (38 total):

APT Minneapolis, Inc. v. City of Maplewood, No. CIV. 97-2082, 1998 WL 634224 (D. Minn. Aug. 12, 1998)

APT Tampa/Orlando, Inc. v. Orange Cty. & Bd. of Comm'rs, No. 97-891-CIV-ORL-22, 1997 WL 33320573 (M.D. Fla. Dec. 10, 1997)

AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 979 F. Supp. 416 (E.D. Va. 1997), *aff'd in part, rev'd in part*, 155 F.3d 423 (4th Cir. 1998)

AT&T Wireless PCS, Inc. v. City of Chamblee, 10 F. Supp. 2d 1326 (N.D. Ga. 1997)

AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adj., 11 F. Supp. 2d 760 (M.D.N.C. 1998), *aff'd in part, rev'd in part*, 172 F.3d 307 (4th Cir. 1999)

Bell Atl. Mobile v. Zoning Bd. of Butler Tp., 138 F. Supp. 2d 668 (W.D. Pa. 2001)

Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington, 3 F. Supp. 2d 178 (D. Conn. 1998)

Cellular Tel. Co. v. Board of Adj. of Paramus, 37 F. Supp. 2d 638 (D.N.J.), *aff'd*, 191 F.3d 444 (3d Cir. 1999)

Cellular Tel. Co. v. Town of Oyster Bay, No. 97-CV-641, 1998 U.S. Dist. LEXIS 21500 (E.D.N.Y. June 17, 1998), *aff'd in part, rev'd in part*, 155 F.3d 490 (2d Cir. 1999)

Cellular Tel. Co. v. Zoning Bd. of Adj. of Harrington Park, 90 F. Supp. 2d 557 (D.N.J. 2000)

Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus, 24 F. Supp. 2d 359 (D.N.J. 1998), *aff'd in part, rev'd in part*, 197 F.3d 64 (3d Cir. 1999)

Flynn v. Burman, 30 F. Supp. 2d 68 (D. Mass. 1998)

Gearon & Co. v. Fulton Cty., Ga., 5 F. Supp. 2d 1351 (N.D. Ga. 1998)

GTE Mobilnet v. Pierce Tp., No. C-1-97-501, 1998 U.S. Dist. LEXIS 22007 (S.D. Ohio Nov. 6, 1998)

National Telecomm. Advisors, Inc. v. City of Chicopee, 16 F. Supp. 2d 117 (D. Mass. 1998)

Omnipoint Comms. Enters., Inc. v. Town of Amherst, N.H., 74 F. Supp. 2d 109 (D.N.H. 1998), *vacated*, 173 F.3d 9 (1st Cir. 1999)

Omnipoint Comms., Inc. v. City of Scranton, 36 F. Supp. 2d 222 (M.D. Pa. 1999)

Omnipoint Comms., Inc. v. Foster Tp., 46 F. Supp. 2d 396 (M.D. Pa. 1999)

Omnipoint Comms., Inc. v. Penn Forest Tp., 42 F. Supp. 2d 493 (M.D. Pa. 1999)

Omnipoint Comms., Inc. v. Zoning Hr'g Bd. of E. Pennsboro Tp., Cumberland Cty., Pa., 4 F. Supp. 2d 366 (M.D. Pa. 1998)

Omnipoint Corp. v. Zoning Hr'g Bd. of Pine Grove Tp., 20 F. Supp. 2d 875 (E.D. Pa. 1998), *aff'd*, 181 F.3d 403 (3d Cir. 1999)

OPM-USA-Inc. v. Board of Cty. Comm'rs of Brevard Cty., Fla., 7 F. Supp. 2d 1316 (M.D. Fla. 1997)

OPM-USA-Inc. v. County of Marion, Fla., No. 97-290-CIV-OC-10B, 1999 WL 1427699 (M.D. Fla. Sept. 30, 1999)

PrimeCo Pers. Comms., Ltd. P'ship v. Lake Cty., Fla., No. 97-208-CIV-OC-10B, 1998 WL 565036 (M.D. Fla. July 20, 1998)

PrimeCo Pers. Comms., L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)

Smart SMR of N.Y., Inc. v. Zoning Comm'n of Stratford, 995 F. Supp. 52 (D. Conn. 1998)

SNET Cellular, Inc. v. Angell, 99 F. Supp. 2d 190 (D.R.I. 2000)

Southwestern Bell Wireless, Inc. v. Board of Cty. Comm'rs of Johnson Cty., Kan., 17 F. Supp. 2d 1221 (D. Kan. 1998), *aff'd*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000)

Sprint Spectrum, L.P. v. Board of Cty. of Comm'rs of Jefferson Cty., Colo., 59 F. Supp. 2d 1101 (D. Colo. 1999)

Sprint Spectrum L.P. v. City of Woburn, 8 F. Supp. 2d 118 (D. Mass. 1998)

Sprint Spectrum L.P. v. Jefferson Cty., 968 F. Supp. 1457 (N.D. Ala. 1997)

Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass. 1997)

Sprint Spectrum L.P. v. Town of Farmington, No. 97-CV-863, 1997 WL 631104 (D. Conn. Oct. 6, 1997)

Sprint Spectrum, L.P. v. Town of N. Stonington, 12 F. Supp. 2d 247 (D. Conn. 1998)

Sprint Spectrum, L.P. v. Willoth, 996 F. Supp. 253 (W.D.N.Y. 1998), *aff'd*, 176 F.3d 630 (2d Cir. 1999)

Sprint Spectrum, L.P. v. Zoning Hr'g Bd. of E. Nottingham Tp., No. 97-1837, 1997 WL 688816 (E.D. Pa. Oct. 15, 1997)

U S WEST Comms., Inc. v. City of Vadnais Heights, No. 97-2248, 1998 U.S. Dist. LEXIS 22962 (D. Minn. May 15, 1998)

Virginia Metronet v. Board of Sup'rs of James City Cty., Va., 984 F. Supp. 966 (E.D. Va. 1998)

1998 Cases (29 total):

360 [Degrees] Comms. Co. v. Board of Sup'rs of Albermarle Cty., 50 F. Supp. 2d 551 (W.D. Va. 1999), *rev'd*, 211 F.3d 79 (4th Cir. 2000)

Aegerter v. City of Delafield, Wis., No. 98-C-192, 1998 WL 1057733 (E.D. Wis. May 5, 1998), *aff'd*, 174 F.3d 886 (7th Cir. 1999)

APT Pittsburgh Ltd. P'ship v. Lower Yoder Tp., Cambria Cty., 111 F. Supp. 2d 664 (W.D. Pa. 2000)

APT Pittsburgh Ltd. P'ship v. Penn Tp., Butler Cty., Pa., 32 F. Supp. 2d 793 (W.D. Pa. 1998), *rev'd*, 196 F.3d 469 (3d Cir. 1999)

AT & T Wireless PCS, Inc. v. City of Atlanta, 50 F. Supp. 2d 1352 (N.D. Ga. 1999), *vacated*, 210 F.3d 1322, *vacated*, 223 F.3d 1324 (11th Cir. 2000), *op. reinstated*, 250 F.3d 1307, *vacated on reh'g en banc*, 260 F.3d 1320 (11th Cir. 2001)

Barnhill v. City of Fairhope, No. CIV. A. 98-0270-P-S, 1998 U.S. Dist. LEXIS 14056 (S.D. Ala. July 17, 1998)

BellSouth Mobility, Inc. v. Miami-Dade Cty., 153 F. Supp. 2d 1345 (S.D. Fla. 2001)

BellSouth Mobility, Inc. v. Parish of Plaquemines, La., 40 F. Supp. 2d 372 (E.D. La. 1999)

Cellco P'ship v. Hess, No. CIV. A. 98-3985, 1999 WL 178364 (E.D. Pa. Mar. 30, 1999)

Cellco P'ship v. Russell, No. 1:98CV23, 1998 U.S. Dist. LEXIS 11639 (W.D.N.C. June 23, 1998), *vacated*, 187 F.3d 628 (4th Cir. 1999)

Cellco P'ship v. Town of Douglas, 81 F. Supp. 2d 170 (D. Mass. 1999)

Corkery v. Town of Canton, No. 98-10054-MEL, 1998 U.S. Dist. LEXIS 23332 (D. Mass. July 13, 1998)

Group EMF, Inc. v. Coweta Cty., 50 F. Supp. 2d 1338 (N.D. Ga. 1999)

Iowa Wireless Servs., L.P. v. City of Moline, Ill., 29 F. Supp. 2d 915 (C.D. Ill. 1998)

Lucas v. Planning Bd. of LaGrange, 7 F. Supp. 2d 310 (S.D.N.Y. 1998)

National Telecomm. Advisors, LLC v. Board of Selectmen of W. Stockbridge, 27 F. Supp. 2d 284 (D. Mass. 1998)

Nextel W. Corp. v. Unity Tp., No. 98-CV-01258 (W.D. Pa. Jan. 20, 1999), *rev'd*, 282 F.3d 257 (3d Cir. 2002)

Omnipoint Comms. Enters., L.P. v. Charlestown Tp., No. 98-CV-6563, 2000 U.S. Dist. LEXIS 866 (E.D. Pa. Jan. 21, 2000)

Omnipoint Comms. Enters., L.P. v. Newtown Tp., No. CIV. A. 98-5171, 1999 WL 269936 (E.D. Pa. Apr. 29, 1999), *aff'd in part, vacated in part*, 219 F.3d 240 (3d Cir.), *cert. denied*, 531 U.S. 985 (2000)

Omnipoint Comms. Enters., L.P. v. Warrington Tp., 63 F. Supp. 2d 658 (E.D. Pa. 1999)

Omnipoint Comms., Inc. v. Planning & Zoning Comm'n of Wallingford, 83 F. Supp. 2d 306 (D. Conn. 2000)

Petersburg Cellular P'ship v. Board of Sup'rs of Nottoway Cty., 29 F. Supp. 2d 701 (E.D. Va. 1998), *rev'd*, 205 F.3d 688 (4th Cir. 2000)

Southwestern Bell Mobile Sys. v. Todd, No. 98-CV-11959 (D. Mass. Nov. 23, 1999), *aff'd*, 244 F.3d 51 (1st Cir. 2001)

SprintCom, Inc. v. City of Cumming, No. 2:98-CV-95-WCO, 1998 U.S. Dist. LEXIS 18523 (N.D. Ga. Sept. 21, 1998)

SprintCom, Inc. v. Village of Mundelein, No. 98 C 4451, 1999 WL 652032 (N.D. Ill. Aug. 20, 1998)

Sprint Spectrum L.P. v. Connecticut Siting Council, No. 98-CV-00033 (D. Conn. Jan. 8, 1998), *aff'd*, 274 F.3d 674 (2d Cir. 2001)

Sprint Spectrum L.P. v. Zoning Hr'g Bd. of Williston Tp., 43 F. Supp. 2d 534 (E.D. Pa. 1999)

Telespectrum, Inc. v. Public Serv. Comm'n of Ky., 43 F. Supp. 2d 755 (E.D. Ky. 1999), *aff'd*, 227 F.3d 414 (6th Cir. 2000)

Western PCS BTA Corp.v. Town of Steilacoom, No. C98-5664RJB, 1999 U.S. Dist. LEXIS 9068 (W.D. Wash. Apr. 20, 1999)

1999 Cases (17 total):

Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158 (S.D. Cal. 2000)

APT Minneapolis, Inc. v. Eau Clair Cty., 80 F. Supp. 2d 1014 (W.D. Wis. 1999)

AT & T Wireless PCS, Inc. v. Town of Porter, 203 F. Supp. 2d 985 (N.D. Ind. 2002)

Brehmer v. Planning Bd. of Wellfleet, No. 99-CV-11169-RGS (D. Mass. Aug. 12, 1999), *aff'd*, 238 F.3d 117 (1st Cir. 2001)

Bressette v. Planning & Zoning Comm'n of N. Stonington, SBA, Inc., 158 F. Supp. 2d 209 (D. Conn. 2001)

Industrial Comms. & Elec., Inc. v. Town of Falmouth, Nos. Civ. 98-397-P-H, 99-96-P-H, 2000 WL 761002 (D. Me. May 9, 2000)

Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan, 62 F. Supp. 2d 691 (N.D.N.Y. 1999)

Omnipoint Comms. Inc. v. Comi, 233 F. Supp. 2d 388 (N.D.N.Y. 2002)

Omnipoint Comms., Inc. v. Port Auth. of N.Y. & N.J., No. 99 CIV. 0060, 1999 WL 494120 (S.D.N.Y. July 13, 1999)

Omnipoint Comms. Enters., L.P. v. Township of Nether Providence, 232 F. Supp. 2d 430 (E.D. Pa. 2002)

Omnipoint Comms., Inc. v. Village of Muttontown, No. CV 99-1155, 1999 U.S. Dist. LEXIS 23004 (E.D.N.Y. June 15, 1999)

Omnipoint Comms. MB Operations, LLC v. Town of Lincoln, 107 F. Supp. 2d 108 (D. Mass. 2000)

Patterson v. Omnipoint Comms., Inc., 122 F. Supp. 2d 222 (D. Mass. 2000), *aff'd*, 23 Fed. Appx. 17 (1st Cir. 2001)

Powertel, Inc. v. Clark Cty., Ind. Bd. of Zoning Apps., No. NA 99-0193-C H/S, 2000 WL 1206702 (S.D. Ind. Aug. 14, 2000)

Sprint Spectrum L.P. v. Mills, 124 F. Supp. 2d 211 (S.D.N.Y. 1999), *aff'd in part, vacated in part, rev'd in part*, 283 F.3d 404 (2d Cir. 2002)

Telecorp Realty, LLC v. Town of Edgartown, 81 F. Supp. 2d 257 (D. Mass. 2000)

Vertical Broad., Inc. v. Town of Southampton, 84 F. Supp. 2d 379 (E.D.N.Y. 2000)

2000 Cases (25 total):

Abrams v. City of Rancho Palos Verdes, No. 00-CV-09071 (C.D. Cal. July 19, 2002), *rev'd*, 354 F.3d 1094 (9th Cir), *petition for cert. filed* (U.S. May 25, 2004) (No. 03-1601)

American Towers, Inc. v. Williams, 146 F. Supp. 2d 27 (D.D.C. 2001), *aff'd*, 50 Fed. Appx. 448 (D.C. Cir. 2002)

APT Minneapolis, Inc. v. Stillwater Tp., No. 00-2500 JRT/FLN, 2001 WL 1640069 (D. Minn. June 22, 2001)

ATC Realty, LLC v. Town of Kingston, N.H., 173 F. Supp. 2d 118 (D.N.H. 2001), *rev'd*, 303 F.3d 91 (1st Cir. 2002)

Laurence Wolf Capital Mgmt. Trust v. City of Ferndale, 128 F. Supp. 2d 441 (E.D. Mich. 2001), *aff'd in part, rev'd in part*, 61 Fed. Appx. 204 (6th Cir. 2003)

Maher v. Hyde, No. 00-CV-11326-REK (D. Mass. Nov. 15, 2000), *appeal dismissed*, 272 F.3d 83 (1st Cir. 2001)

National Tower, LLC v. Frey, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd sub nom. National Tower, LLC v. Plainville Zoning Bd. of Apps.*, 297 F.3d 14 (1st Cir. 2002)

New Par v. City of Saginaw, 161 F. Supp. 2d 759 (E.D. Mich. 2001), *aff'd but criticized*, 301 F.3d 390 (6th Cir. 2002)

New York SMSA Ltd. P'ship v. Town of Clarkstown, 99 F. Supp. 2d 381 (S.D.N.Y. 2000)

New York SMSA Ltd. P'ship v. Town of Riverhead Town Bd., 118 F. Supp. 2d 333 (E.D.N.Y. 2000), *aff'd*, 45 Fed. Appx. 24 (2d Cir. 2002)

Nextel Comms. of Mid-Atlantic, Inc. v. City of Margate, No. 00-CV-05137 (D.N.J. Sept. 26, 2002), *vacated*, 305 F.3d 188 (3d Cir. 2002)

Nextel Comms. of Mid-Atlantic, Inc. v. Manchester-by-the-Sea, 115 F. Supp. 2d 65 (D. Mass. 2000)

Nextel Comms. of Mid-Atlantic, Inc. v. Town of Milford, No. 00-CV-11576-GAO, 2001 U.S. Dist. LEXIS 18323 (D. Mass. Aug. 2, 2001)

Nextel Comms. of Mid-Atlantic, Inc. v. Town of Randolph, Mass., 193 F. Supp. 2d 311 (D. Mass. 2002)

Nextel Partners, Inc. v. Kingston Tp., No. 99-CV-02097 (M.D. Pa. July 25, 2000), *aff'd*, 286 F.3d 687 (3d Cir. 2002)

Omnipoint Comms., Inc. v. Planning & Zoning Comm'n of Guilford, 156 F. Supp. 2d 212 (D. Conn. 2001)

Pennsylvania Cellular Tel. Corp. v. Zoning Hr'g Bd. Buck Tp., 127 F. Supp. 2d 635 (M.D. Pa. 2001)

Preferred Sites, LLC v. Troup Cty., No. 00-CV-00081 (N.D. Ga. July 11, 2000), *aff'd*, 296 F.3d 1210 (11th Cir. 2002)

SBA Comms., Inc. v. Zoning Comm'n of Brookfield, 112 F. Supp. 2d 233 (D. Conn. 2000)

Second Gen. Props., L.P. v. Town of Pelham, No. CIV. 00-090-B, 2002 WL 1018923 (D.N.H. May 21, 2001), *aff'd but criticized*, 313 F.3d 620 (1st Cir. 2002)

SiteTech Grp. Ltd. v. Board of Zoning Apps. of Brookhaven, 140 F. Supp. 2d 255 (E.D.N.Y. 2001)

Sprint Spectrum L.P. v. Charter Tp. of W. Bloomfield, 141 F. Supp. 2d 795 (E.D. Mich. 2001)

Tower Ventures v. City of Westfield, No. 00-CV-30196-MAP (D. Mass. Nov. 26, 2001), *aff'd*, 296 F.3d 43 (1st Cir. 2002)

USCOC of N.H. RSA #2 v. Town of Hopkinton, N.H., 137 F. Supp. 2d 9 (D.N.H. 2001)

USCOC of Okla. RSA #10 Inc. v. Board of Adj., No. CIV-00-354-S, 2001 U.S. Dist. LEXIS 25373 (E.D. Okla. Jan. 5, 2001)

2001 Cases (28 total):

American Cellular Network, LLC v. Upper Dublin Tp., 203 F. Supp. 2d 383 (E.D. Pa. 2002)

ATC Realty, LLC v. Town of Sutton, N.H., No. CV-01-046-M, 2002 WL 467132 (D.N.H. Mar. 7, 2002)

AT & T Wireless Servs. of Cal. LLC v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003)

Benjamina Nursery Farm, Inc. v. Miami-Dade Cty., 170 F. Supp. 2d 1246 (S.D. Fla. 2001)

CIS Comms., L.L.C. v. County of Jefferson, Mo., 222 F. Supp. 2d 1148 (E.D. Mo. 2002)

Connecticut Architectural Towers, L.L.C. v. Town of Monroe Zoning Comm'n, No. 3:01CV186, 2001 WL 1829114 (D. Conn. July 23, 2001)

Cox Comms. PCS, L.P. v. City of San Marcos, 204 F. Supp. 2d 1272 (S.D. Cal. 2002)

Crown Atl. Co. LLC v. Town of Fitzwilliam, No. 01-210-M, 2002 WL 1072286 (D.N.H. May 30, 2002)

Crown Castle Atl., LLC v. Board of Sup'rs of Loudon Cty., No. 01-526-A, 2002 U.S. Dist. LEXIS 22000 (E.D. Va. Jan. 14, 2002)

Mason v. O'Brien, No. 1:01-CV-1556, 2002 WL 31972190 (N.D.N.Y. Sept. 30, 2002)

MIOP, Inc. v. City of Grand Rapids, 175 F. Supp. 2d 952 (W.D. Mich. 2001)

Network Towers, LLC v. Town of Hagerstown, No. IP 01-1833-CH/K, 2002 WL 1364156 (S.D. Ind. May 15, 2002)

Nextel Comms. of Mid-Atlantic, Inc. v. Town of Sudbury, Mass., No. CIV. A. 01-11754-DPW, 2003 WL 543383 (D. Mass. Feb. 26, 2003)

Omnipoint Comms., Inc. v. City of White Plains, 175 F. Supp. 2d 697 (S.D.N.Y. 2001)

Omnipoint Comms., Inc. v. Common Council of Peekskill, 202 F. Supp. 2d 210 (S.D.N.Y. 2002)

Omnipoint Holdings, Inc. v. City of Southfield, 203 F. Supp. 2d 804 (E.D. Mich. 2002), *aff'd*, 355 F.3d 601(6th Cir. 2004)

Omnipoint Holdings, Inc. v. Town of Westford, 206 F. Supp. 2d 166 (D. Mass. 2002)

Pinney v. Nokia (In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.), 216 F. Supp. 2d 474 (D. Md. 2002)

PrimeCo Pers. Comms., Ltd. P'ship v. City of Mequon, 242 F. Supp. 2d 567 (E.D. Wis.), *aff'd*, 352 F.3d 1147 (7th Cir. 2003)

Schiazza v. Zoning Hr'g Bd. of Fairview Tp., York Cty., Pa., 168 F. Supp. 2d 361 (M.D. Pa. 2001)

Sprint Spectrum, L.P. v. Board of Zoning Apps. of Brookhaven, 244 F. Supp. 2d 108 (E.D.N.Y. 2003)

Sprint Spectrum L.P., v. Parish of Plaquemines, No. CIV. A. 01-0520, 2003 WL 193456 (E.D. La. Jan. 28, 2003)

Sprint Spectrum L.P. v. Town of Ogunquit, 175 F. Supp. 2d 77 (D. Me. 2001)

Telecorp Realty, L.L.C. v. Board of Adj. of Story Cty., No. CIV. 4-01-CV-10369, 2001 WL 1678736 (S.D. Iowa Nov. 20, 2001)

United States Cellular Tel. of Greater Tulsa L.L.C. v. Tulsa City Bd. of Adj., No. 01-CV-0531-EA, 2001 U.S. Dist. LEXIS 25370 (N.D. Okla. Dec. 20, 2001)

United States Cellular Tel. of Greater Tulsa L.L.C. v. City of Broken Arrow, No. 01-CV-518-E, 2002 U.S. Dist. LEXIS 26654 (N.D. Okla. Oct. 2, 2002), *aff'd in part, rev'd in part*, 340 F.3d 1122 (10th Cir. 2003)

United States Cellular Corp. v. City of Wichita Falls, Tex., No. CIV. A. 7:01-CV-162-R, 2003 WL 21246125 (N.D. Tex. Apr. 21, 2003), *aff'd*, 364 F.3d 250 (5th Cir. 2004)

VoiceStream Minneapolis, Inc. v. St. Croix Cty., 212 F. Supp. 2d 914 (W.D. Wis. 2002), *aff'd*, 342 F.3d 818 (7th Cir. 2003)

2002 Cases (10 total):

Independent Wireless One Corp. v. Town of Charlotte, 242 F. Supp. 2d 409 (D. Vt. 2003)

MetroPCS, Inc. v. City & Cty. of San Francisco, 259 F. Supp. 2d 1004 (N.D. Cal. 2003)

Nextel Comms. of Mid-Atlantic, Inc. v. City of Cambridge, 246 F. Supp. 2d 118 (D. Mass. 2003)

Nextel Comms. of Mid-Atlantic, Inc. v. Town of Provincetown, No. CIV. A. 02-11646-DPW, 2003 WL 21497159 (D. Mass. June 26, 2003)

Nextel Comms. of Mid-Atlantic, Inc. v. Town of Wayland, Mass., 231 F. Supp. 2d 396 (D. Mass. 2002)

Nextel Partners, Inc. v. Town of Amherst, N.Y., 251 F. Supp. 2d 1187 (W.D.N.Y. 2003)

Sprint Spectrum, L.P. v. City of Carmel, Ind., No. 102CV01133JDTTAB, 2003 WL 21254443 (S.D. Ind. Mar. 28, 2002), *aff'd*, 361 F.3d 998 (7th Cir. 2004)

Tennessee ex rel. Wireless Income Props., LLC v. City of Chattanooga, No. 1:02-CV-372, 2003 U.S. Dist. LEXIS 22103 (E.D. Tenn. Oct. 20, 2003)

Tower Asset Sub, Inc. v. McHenry Cty. Conserv. Dist., No. 02 C 5147, 2002 WL 31375502 (N.D. Ill. Oct. 21, 2002)

USCOC of Va. RSA #3, Inc. v. Montgomery Cty. Bd. of Sup'rs, 245 F. Supp. 2d 817 (W.D. Va.), *aff'd in part, rev'd in part*, 343 F.3d 262 (4th Cir. 2003)

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Omnipoint Comms., Inc. v. Village of Tarrytown Planning Bd., 302 F. Supp. 2d 205 (S.D.N.Y. 2004)
Russell's Garden Ctr., Inc. v. Nextel Comms. of Mid-Atlantic, Inc., 296 F. Supp. 2d 13 (D. Mass. 2003)
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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Cellular Telephone Industry Association, Semi-Annual Wireless Industry Survey Results (2004) <http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030>	3
Stern, Grossman, *et al., Supreme Court Practice* (8th ed. 2002)	3, 6

Respondent does not dispute that the Ninth Circuit's decision creates a circuit conflict. The Third and Seventh Circuits have concluded that, because the Communications Act creates a "comprehensive remedial scheme," violations of the antenna siting provisions of 47 U.S.C. § 332(c)(7) may not be asserted under 42 U.S.C. § 1983. *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687 (3d Cir. 2002); *Primeco PCS (Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (7th Cir. 2003). The Ninth Circuit reached the opposite result here, exposing thousands of local governments to significant damages and fee awards for even good-faith zoning decisions.

Respondent's attempt to downplay the importance of that conflict is unpersuasive. His analysis overlooks at least a hundred recent cases; ignores the chilling effect on local authority; fails to acknowledge the issue's legal significance; and is belied by the amicus briefs submitted by nine States, by the National League of Cities, *et al.*, and by cities and counties throughout the Ninth Circuit, all of which urge the Court to grant review. Nor is the Ninth Circuit's remand to determine the *amount* of damages and fees under Sections 1983 and 1988 an impediment to further review. The authorities cited by respondent confirm the propriety of review despite such remands, and this Court has regularly resolved the issue raised here—the availability of Section 1983 and associated relief—in cases with indistinguishable remands, including *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), itself.

I. The Circuits And District Courts Are Divided

Although respondent repeatedly acknowledges the "circuit split," Br. in Opp. 11, 13, he attempts to dismiss the Third Circuit's decision in *Nextel* as "dictum," *id.* at 13. But respondent concedes that *Nextel* itself twice characterizes its ruling as a holding. *Ibid.*; 286 F.3d at 694 ("We hold that" Section 332(c)(7)'s "comprehensive remedial regime" precludes claims "under § 1983"); *id.* at 696 (We "hold that the" Act "did not create a right that can be asserted under

§ 1983"). The Ninth Circuit understood *Nextel*'s resolution of that issue to be a "holding." Pet. App. 8a. And respondent conceded below that it was a "holding." Resp. C.A. Br. 36.

Respondent now claims that *Nextel*'s resolution of that issue—the entirety of Part III of the opinion—was "unnecessary" because, "[b]efore reaching the Section 1983 issue, the Third Circuit first held that" there was no "substantive [Communications Act] violation" at all. Br. in Opp. 13. But respondent does not cite *where* the Third Circuit allegedly held that there was no "substantive * * * violation." Nor can such a holding be found. *Nextel* first held that the plaintiff could not assert the alleged violation *under the cause of action* created by the Communications Act, 47 U.S.C. § 332(c)(7)(B)(v), because that cause of action requires "final action" (or a failure to act) on a "request for authorization to place, construct, or modify personal wireless service facilities." The plaintiff in *Nextel* had never filed such a request. 286 F.3d at 692-693; Pet. 14 n.6. *Nextel* then held that the claim for injunctive relief became moot when the challenged ordinance was amended. 286 F.3d at 693; Pet. 14 n.6. Finally, *Nextel* rejected the Section 1983 damages claim, holding that the Communications Act creates a comprehensive remedial scheme. 286 F.3d at 693-696. Because the plaintiff in *Nextel* would have been entitled to pursue its Section 1983 claim absent that holding—seeking damages for the period during which the challenged ordinance allegedly "prohibit[ed] the provision of personal wireless services" in violation of 47 U.S.C. § 332(c)(7)(B)(i), see 286 F.2d at 689—*Nextel*'s resolution of that issue was unquestionably necessary to the judgment.

Although respondent does not even attempt to characterize the Seventh Circuit's *Verizon Wireless* decision as dictum, he asserts that it "focus[ed] on the availability of attorneys fees under § 1988." Br. in Opp. 14. But fees under Section 1988 are available only if there is a claim under Section 1983. The Seventh Circuit's holding—that "42 U.S.C. § 1983, which drags section 1988 in its wake, should not be fastened, barnacle-like" to the Communications Act "by judicial *Diktat*," 352 F.3d at 1153—unambiguously forecloses both.

Finally, respondent errs in claiming (Br. in Opp. 14) that the disarray in the district courts (Pet. 19-20) weighs against review. That confusion demonstrates the pressing and pervasive nature of the conflict. See Stern, Gressman, *et al.*, *Supreme Court Practice* 239 (8th ed. 2002). Thousands of local governments now face grave uncertainty over whether good faith efforts to enforce local zoning requirements can lead to "serious, and potentially disastrous" fee awards and liability. Br. Nat'l League of Cities 11. Because that uncertainty undermines Congress's effort to "[p]reserv[e] * * * local zoning authority," 47 U.S.C. § 322(c)(7)—and forces municipalities to choose between potential liability and the permanent consequences of inappropriately sited towers—it underscores the need for prompt review. *Id.* at 13.

II. The Issue Is Recurring And Important

Respondent disputes neither the large number of cases addressing this issue nor the federal courts' observations that they "now routinely hear" antenna-siting disputes. Pet. 26. Nor does respondent take issue with the myriad factors that have generated that litigation, including ever-expanding wireless usage. *Id.* at 27-28 & n.8. Indeed, according to the Cellular Telephone Industry Association, more than *23,000* new cell sites were added in 2003 alone, <http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030>, and local governments report "no let-up in the lawsuits that wireless carriers are filing." Br. Local Gov't Amici 18.

Respondent nonetheless asserts that his "thorough analysis" shows that the litigation has mysteriously evaporated, with "less than 10" Section 332(c)(7) cases "filed in 2003." Br. in Opp. 20. Not true. For *California alone*, the City's own (*ad hoc*) review of recent lawsuits filed by major PCS and cellular licensees—which necessarily excludes numerous suits by landowners or smaller businessmen like respondent—

identified no fewer than twelve Section 332(c)(7) lawsuits filed in 2003, *not one of which* is included in respondent's estimate. See App., *infra*, 6a-10a. Indeed, while respondent reports only 16 cases for 2002 and 2003 nationwide, the City lists in the Appendix, *infra*, no fewer than 110 confirmed cases filed during that period, and still more filed in the first half of 2004. Because the search for these cases is difficult (no centralized database exists), even these cases represent only the tip of the litigation iceberg. The assertion that the litigation has slowed to a "trickle" of 10 cases thus cannot be taken seriously.

Respondent's estimate appears to count only lawsuits with *reported decisions*. But only a small fraction of cases are resolved by judicial decision, and only a tiny fraction of those are *reported*. Nor do reported decisions accurately reflect trends in the quantity of litigation over time. When a statutory provision is new and its application is necessarily novel, a larger percentage of district court decisions addressing it will be designated for publication. Moreover, there will often be fewer reported decisions for more recent years because many recent cases remain unresolved. Respondent thus ignores the fact that, unlike cases filed in earlier years, almost half of the cases filed in 2003 cannot be reported because they have not been decided. Even respondent's explanation for the purported decline in lawsuits lacks credibility. Respondent posits that municipalities and wireless providers must have resolved their differences, because more than 92% of tower applications are now approved in less than 2 months. Resp. 20 (citing Admin. Rec. 1054). Respondent's 92% figure, however, is drawn from a document issued in 1996, shortly after Section 332(c)(7) was enacted. It thus neither supports nor explains respondent's claim that lawsuits have fallen off.

Finally, respondent disregards the dramatic chilling effect the Ninth Circuit's decision has on the exercise of the local zoning authority that Section 332(c)(7) was designed to preserve. As the petition explains (at 29-30), and as the amicus briefs of the National League of Cities, *et al.* (at 11-

14) and Local Governments (at 19-20) confirm, many local governments can ill-afford to risk potentially staggering fee awards or liability. Many thus may shrink from exercising their authority to reject even inappropriately sited towers. The need to avoid the enduring consequences of that distortion likewise supports further review.

III. Review Is Appropriate In This Case

Respondent does not dispute that the decision below constitutes a final judgment reviewable under 28 U.S.C. § 1254(1). Nor does he deny that it conclusively resolves the *availability* of Section 1983 relief and Section 1988 fees. Nonetheless, he urges the Court to deny review because the Ninth Circuit remanded for a determination of the *amount* of damages and attorney's fees. Br. in Opp. 9-11. But that sort of remand, even if it renders the decision nominally "interlocutory," does not weigh against review here. Respondent concedes that this Court will grant review despite a remand "if resolution of the issue is 'fundamental to the further conduct of the case.'" Br. in Opp. 10 (quoting *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947)). Here, there will be no reason for proceedings on remand to calculate damages and fees if this Court, like the district court below and the Third and Seventh Circuits, determines that Section 1983 and 1988 relief is unavailable. It is difficult to imagine anything more "fundamental to the further conduct of [a] case" than whether there should be any further proceedings at all. The leading treatise agrees: "[T]he interlocutory status of the case may be no impediment to certiorari where," as here, the issue is "otherwise worthy of review, and [this Court's] intervention may serve to hasten or finally resolve the litigation." Stern, Gressman, *et al.*, *supra*, at 260.

Indeed, this Court has regularly granted review to decide the issue raised here—the availability of Section 1983 and 1988 relief—in precisely this procedural posture. *Sea Clammers* itself was such a case. There, as here, the district court held that relief under Sections 1983 and 1988 was un-

available, but the court of appeals reversed and "remanded to the district court for further proceedings." *Nat'l Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1238 (3d Cir. 1980). This Court granted the petition nonetheless, ultimately holding that Section 1983 and 1988 relief was foreclosed. 453 U.S. at 7-10. The Court has repeatedly reviewed other putatively "interlocutory" *Sea Clammers* decisions since. It did so despite a remedial remand in *Blessing* v. *Freestone*, 520 U.S. 329, 338-339 (1997), and despite a merits remand in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 504-505 (1990) (reviewing 868 F.2d 665). The Court did likewise in *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 369-370 (1978), addressing the availability of Section 1985 relief notwithstanding a remand, 584 F.2d at 1251-1253, 1262. Respondent offers no reason to depart from that settled practice here.

This Court, of course, is reluctant to grant petitions in interlocutory cases where the remand can add insight into or potentially alter the nature of the question before the Court. But where, as here, the issue before the Court is the statutory *availability* of fees or damages, remand proceedings on *amount*—matters respondent himself characterizes as "exclusively financial," Br. in Opp. 11—cannot have such an effect. Consequently, the Court has repeatedly granted review of attorney's fee decisions that, like the decision below, hold fees to be available and remand to the district court to determine the amount. See, *e.g.*, *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 241, 246 (1975); *Marek v. Chesny*, 473 U.S. 1, 4-5 (1985); *North Carolina Dep't of Transp.* v. *Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 11 (1986). The remands posed no barrier to review in those cases, and it likewise poses no barrier here.[1]

[1] Just last Term, this Court likewise granted review in numerous cases despite remand orders where the remand would not illuminate the question of statutory construction before the Court. *E.g.*, *General Dynamics Land Sys.* v. *Cline*, 124 S. Ct. 1236, 1240 (2004); *Pennsylvania State Police* v. *Suders*, 124 S. Ct. 2342, 2344 (2004); *Sabri* v. *United States*, 124 S. Ct. 1941 (2004). Respondent thus errs in relying on cases where the remand could illuminate or alter the question before the Court, such as *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). In *VMI*, the remand left the question presented—whether "it is constitutional for a State to have a men-only military school"—partially unresolved, stating that VMI *might not* be required to admit women if the State "establish[ed] parallel" institutions for them. 508 U.S at 946; 976 F.2d at 900. The remand thus had the potential not only to illuminate feasibility issues but also to change the case from one about wholesale exclusion of women, 976 F.2d at 898-899, to one about separate, parallel institutions.

IV. Respondent's Defense Of The Ninth Circuit's Decision On The Merits Underscores The Need For Review

A. Respondent does not dispute that the Communications Act provides an expedited cause of action, 47 U.S.C. § 332(c)(7)(B)(v), through which aggrieved parties may obtain judicial redress from land-use decisions that violate the Act. Nor does he deny (Pet. 16, 18, 21) that Congress's decision to "provid[e] for private judicial remedies" itself "evidence[s] congressional intent to supplant the Section 1983 remedy." *Wright* v. *Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427 (1987). Instead, respondent urges that the Communications Act's cause of action is not "remedial" under *Sea Clammers* because it does not "provide for damages, injunctive relief, attorneys fees or other forms of relief." Br. in Opp. 16 & n.16.

To the extent respondent argues that Section 332(c)(7)(B)(v) establishes a cause of action for judicial review, but does not permit courts to impose any remedies, his contention is absurd. Such a cause of action would be nonjusticiable; federal courts have no authority to issue advisory opinions divorced from relief that alters the legal relationship of the parties. That construction, moreover, conflicts with the decisions of every other court to have considered the issue, all of which have concluded that Section 332(c)(7)(B)(v) at least

authorizes injunctive relief. Pet. 22; Br. State Amici 17; Br. Local Gov't Amici 11-12.

Respondent's effort to label Section 332(c)(7)(B)(v) "procedural," Br. in Opp. 16-17, likewise misses the point. Federal courts deciding cases under the cause of action created by Section 332(c)(7)(B)(v) have authority to order issuance of the very thing the claimant sought in the first instance—a permit to build the disputed antenna structure—relief that is "quick and complete." *Nat'l Telecomm. Advisors, Inc.* v. *City of Chicopee*, 16 F. Supp. 2d 117, 123 (D. Mass. 1998). Indeed, the district court ordered precisely that relief here. Pet. App. 13a-15a. For that reason, respondent errs in relying (Br. in Opp. 17) on First Amendment adult-business-licensing decisions, such as *City of Littleton* v. *Z.J. Gifts*, 124 S. Ct. 2219 (2004). Those decisions recognize that expedited judicial review protects First Amendment interests precisely *because* it, like the judicial review provided by Section 332(c)(7)(B)(v), allows courts promptly to remedy improper permit denials.

B. Departing from his claim that the Communications Act provides *no* relief, respondent argues that relief under Section 332(c)(7)(B)(v) is less varied, Br. in Opp. 18, subject to a shorter limitations period, *id.* at 17, less rapid, *id.* at 17-18, or available through fewer venues (administrative as well as judicial), *id.* at 18-19, than respondent would like. But this Court repeatedly has recognized that Congress's imposition of *limits* on statutory remedies ordinarily precludes efforts to circumvent those limits through suit under Section 1983. Pet. 23-24 (quoting *Sea Clammers*, 453 U.S. at 20, and its progeny). Respondent's contrary approach illogically converts Congress's decision to *omit* particular remedies from the statutory scheme (*e.g.*, damages) into evidence that Congress *intended to provide those remedies* under Section 1983. Pet. 23-24.

The argument, moreover, reflects precisely the "more is better" approach to determining "comprehensiveness" under *Sea Clammers* that the Third and Seventh Circuits have

rejected. Br. State Amici 6-8. Those courts examine whether the remedial scheme represents a balance of "benefits and corresponding limitations" that suggests that *Congress* meant the scheme to be self-contained, or that might be upset by superimposing Section 1983's expansive remedies. The Communications Act's highly reticulated system, which repeatedly specifies legal duties for various entities *and* the corresponding remedial mechanisms, is precisely such a regime. See Pet. 21.

The Ninth Circuit's decision rides roughshod over the balance established by Section 332(c)(7)(B)(v). As the Third Circuit observed, permitting suit under Section 1983 would "free" plaintiffs from the "30-day limitations period" in Section 332(c)(7), would "free" courts from mandatory expedition, and would make "attorney's fees * * * available" even though Congress did not provide them in the Communications Act. 286 F.3d at 695; Pet. 24. Recognizing that, respondent urges that the Ninth Circuit's decision avoids such conflicts by "clearly" holding that the 30-day limitations period in Section 332(c)(7)(B)(v) applies to suits under Section 1983. Br. in Opp. 8, 11-12 & n.11, 21. But the Ninth Circuit's opinion never says that. The theory, moreover, is legally incoherent. The 30-day limitations period in Section 332(c)(7)(B)(v) does not by its terms apply to any cause of action other than the one that Section 332(c)(7)(B)(v) itself creates; respondent nowhere explains why that limit can be judicially transplanted from Section 332(c)(7) into a wholly separate statute like Section 1983. Indeed, such an effort would conflict with 42 U.S.C. § 1658. As the Third Circuit recognized, 286 F.3d at 695, Section 1658 would supply a four-year limitations period for Section 1983 suits like this one if such suits were permissible. Pet. 24 (citing *Jones* v. *R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1845 (2004)).

The theory is also at odds with *Sea Clammers* and its progeny. None of those cases transplants statutory limits from one remedial scheme—the 60-day notice rule in *Sea*

Clammers, 453 U.S. at 14, or the procedures and limitations in *Novotny*, 442 U.S. at 375-376, and *Smith* v. *Robinson*, 468 U.S. at 1010-1011—onto Section 1983. Rather, those cases recognize that, where Congress provides specific remedial procedures inconsistent with suit under Section 1983, Section 1983 remedies are unavailable.[2]

Ultimately, respondent never confronts the irony of construing a provision entitled "*Preservation* of local zoning authority" to impose the heavy sanctions of damages and attorney's fees on municipalities exercising that authority. Pet. 24. Moreover, while respondent admits that the Ninth Circuit's reading of the savings clause in 47 U.S.C. § 152 (note) conflicts with the Third Circuit's, Br. in Opp. 8-9; Pet. 19, respondent nowhere attempts to explain why the Ninth Circuit's reading is persuasive, see *Nextel*, 286 F.3d at 696. Nor does respondent try to reconcile the Ninth Circuit's construction of that savings clause with this Court's construction of a similar savings provision in *Sea Clammers*. Pet. 25-26. That silence speaks volumes.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[2] Respondent's further attempt to reconcile the provisions by asserting that damages may be available under the Communications Act (Br. in Opp. 15), is likewise unpersuasive. The claim does not even reconcile the remedial regimes at a financial level, since Section 1983 exposes municipalities to large attorney's fee awards (which often exceed damages), whereas the Communications Act does not. Br. State Amici 17-18; Br. Nat'l League of Cities, *et al.*, 12-14. Furthermore, respondent did not seek damages under the Communications Act, and the Ninth Circuit noted "the lack of any damages in the" Act. Pet. App. 7a. Respondent thus seeks to avoid review by contradicting the decision he seeks to defend.

Respectfully submitted.

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APPENDIX

APPENDIX

Section 332(c)(7) Cases
2002-2004

Cases filed in 2002

1. *American Tower Corp.* v. *Town of Carlisle*, No. 02-CV-10285 (D. Mass. filed Feb. 20, 2002).
2. *American Towers, Inc.* v. *Woodward*, No. 02-CV-11919 (D. Mass. filed Sept. 30, 2002).
3. *AT&T Wireless PCS* v. *City of New Bedford*, No. 02-CV-12203 (D. Mass. filed Nov. 12, 2002).
4. *AT&T Wireless PCS* v. *Town of Ashburnham*, No. 02-CV-40236 (D. Mass. filed Dec. 2, 2002).
5. *AT&T Wireless PCS* v. *Town of Carlisle*, No. 02-CV-10271 (D. Mass. filed Feb. 19, 2002).
6. *AT&T Wireless PCS* v. *Town of Franklin*, No. 02-CV-12343 (D. Mass. filed Dec. 4, 2002).
7. *AT&T Wireless PCS* v. *Town of Goshen*, No. 02-CV-30214 (D. Mass. filed Dec. 20, 2002).
8. *AT&T Wireless PCS* v. *Town of Kingston*, No. 02-CV-12452 (D. Mass. filed Dec. 23, 2002).
9. *AT&T Wireless, PCS* v. *Town of Westminster*, No. 02-CV-40215 (D. Mass. filed Nov. 8, 2002).
10. *Cellco Partnership* v. *City of Lynn*, No. 02-CV-11583 (D. Mass. filed Aug. 6, 2002).
11. *Cellco Partnership* v. *Town of Carlisle*, No. 02-CV-10277 (D. Mass. filed Feb. 19, 2002).
12. *Cellco Partnership* v. *Town of Dudley*, No. 02-CV-12080 (D. Mass. filed Oct. 23, 2002).
13. *Cellco Partnership* v. *Town of Grafton,*, No. 02-CV-11600 (D. Mass. filed Aug. 9, 2002).

14. *Cox PCS Assets LLC* v. *City of Thousand Oaks*, No. 02-CV-02805 (C.D. Cal. filed Apr. 4, 2002) (Consolidated with *Pac Bell Wireless* v. *City of Thousand Oaks*, No. 02-CV-03780).
15. *Eliska Wireless* v. *Baldwin County Planning and Zoning Commission*, No. 02-CV-00721 (S.D. Ala. filed Sept. 26, 2002).
16. *Eliska Wireless* v. *City of Gulf Shores*, No. 1:02-CV-00639 (S.D. Ala. filed Aug. 21, 2002).
17. *Florida RSA No. 8 Inc.* v. *City of Gainesville*, No. 02-CV-126 (N.D. Fla. filed Sept. 30, 2002).
18. *GTE Mobilnet of California L.P.* v. *City of Watsonville*, No. 02-CV-05764 (N.D. Cal. filed Dec. 11, 2002).
19. *Independent Wireless One Corp.* v. *Town of Charlotte*, No. 02-CV-261 (D. Vt. filed Oct. 9, 2002) (242 F. Supp. 2d 409 (2003)).
20. *MetroPCS, Inc.* v. *City and County of San Francisco*, No. 02-CV-3442 (N.D. Cal. filed July 17, 2002) (259 F. Supp. 2d 1004 (2003)).
21. *New York SMSA L.P.* v. *Board of Appeals*, No. 02-CV-04885 (E.D.N.Y. filed Sept. 5, 2002).
22. *New York SMSA Limited* v. *Town of North Salem*, No. 7:02-CV-09662 (S.D.N.Y. filed Dec. 5, 2002).
23. *Nextel Communications* v. *Town of Provincetown*, No. 02-CV-12406 (D. Mass. filed Dec. 13, 2002).
24. *Nextel Communications of the Mid-Atlantic, Inc.* v. *City of Cambridge*, No. 02-CV-10429 (D. Mass. filed Mar. 12, 2002) (246 F. Supp. 2d 118 (2003)).
25. *Nextel Communications of the Mid-Atlantic, Inc.* v. *Town of Wayland*, No. 02-CV-10260 (D. Mass. filed Feb. 15, 2002) (231 F. Supp. 2d 396 (2002)).

26. *Nextel Communications of the Mid-Atlantic, Inc.* v. *Town of Provincetown*, No. 02-CV-11646 (D. Mass. filed Aug. 16, 2002) (2003 WL 21497159 (June 26, 2003)).
27. *Nextel Communications of the Mid-Atlantic, Inc.* v. *Ridley Park Borough*, No. 02-CV-07847 (E.D. Pa. filed Oct. 11, 2002).
28. *Nextel of New York* v. *Town of Lagrange*, No. 02-CV-04260 (S.D.N.Y. filed June 6, 2002).
29. *Nextel of New York, Inc.* v. *Board of Zoning Appeals of the Town of Hempstead*, No. 02-CV-04888 (E.D.N.Y. filed Sept. 6, 2002).
30. *Nextel Partners* v. *Sarpy County Board*, No. 02-CV-00282 (D. Neb. filed June 11, 2002).
31. *Nextel Partners* v. *Saunders County Board of Supervisors*, No. 02-CV-00516 (D. Neb. filed Nov. 5, 2002).
32. *Nextel Partners, Inc.* v. *Town of Amherst*, No. 02-CV-6483 (W.D.N.Y. filed Sept. 19, 2002) (251 F. Supp. 2d 1187 (2003)).
33. *Nextel* v. *Cobb County*, No. 02-CV-00129 (N.D. Ga. filed Jan. 17, 2002).
34. *Nextel WIP Lease* v. *Town of Charlotte*, No. 02-CV-00319 (D. Vt. filed Dec. 13, 2002).
35. *Omnipoint Holdings* v. *City of Lowell*, No. 02-CV-12234 (D. Mass. filed Nov. 15, 2002).
36. *Omnipoint Holdings* v. *Town of Ayer*, No. 02-CV-11415 (D. Mass. filed July 11, 2002).
37. *Pac Bell Wireless* v. *City of Irvine*, No. 02-CV-08947 (C.D. Cal. filed Nov. 21, 2002).

38. *Pac Bell Wireless* v. *City of Thousand Oaks*, No. 02-CV-3780 (C.D. Cal. filed May 9, 2002) (Consolidated with *Cox PCS Assets LLC* v. *City of Thousand Oaks*, No. 02-CV-02805).
39. *Pacific Bell Telephone Co.* v. *California Department of Transportation*, No. 3:02-CV-02500 (N.D. Cal. filed May 22, 2002).
40. *Pacific Bell* v. *City of Los Angeles*, No. 02-CV-7911 (S.D. Cal. filed Oct. 10, 2002).
41. *Pacific Bell Wireless LLC* v. *City of Los Angeles*, Nos. 02-CV-9152, 03-CV-00588 (S.D. Cal. filed Dec. 2, 2002).
42. *Sprint PCS Assets* v. *City of Malibu*, No. 02-CV-660 (C.D. Cal. filed July 17, 2002).
43. *Sprint Spectrum L.P.* v. *Town of Dartmouth*, No. 02-CV-10332 (D. Mass. filed Feb. 25, 2002).
44. *Sprint Spectrum L.P.* v. *Town of Groton*, No. 02-CV-10365 (D. Mass. filed Mar. 4, 2002).
45. *Sprint Spectrum L.P.* v. *Town of Norfolk*, No. 02-CV-10925 (D. Mass. filed May 22, 2002).
46. *Sprint Spectrum L.P.* v. *Town of Sharon*, No. 02-CV-11697 (D. Mass. filed Aug. 26, 2002).
47. *Sprint Spectrum L.P.* v. *Town of York*, No. 02-CV-00038 (D. Me. filed Feb. 21, 2002).
48. *Sprint Spectrum L.P.* v. *Village of Tarry*, No. 02-CV-06446 (S.D.N.Y. filed Aug. 14, 2002).
49. *Sprint Spectrum, L.P.* v. *City of Carmel*, No. 02-CV-01133 (S.D. Ind. filed July 23, 2002) (2003 WL 21254443 (Mar. 28, 2002)).
50. *Sprint Spectrum, L.P.* v. *Village of Irvington*, No. 02-CV-08204 (S.D.N.Y. filed Oct. 16, 2002).

51. *Sprint Telephony PCS* v. *County of San Diego*, No. 02-CV-2458 (S.D. Cal. filed Dec. 13, 2002).
52. *Sprintcom, Inc.* v. *City of Elyria*, No. 02-CV-00088 (N.D. Ohio filed Jan. 15, 2002).
53. *Sprintcom, Inc.* v. *Kentucky Public Service Commission*, No. 02-CV-00022 (E.D. Ky. filed Feb. 6, 2002).
54. *Tennessee ex rel. Wireless Income Props., LLC* v. *City of Chattanooga*, No. 02-CV-372 (E.D. Tenn. filed Dec. 10, 2002) (2003 WL 23471549 (Oct. 20, 2003)).
55. *Tower Asset Sub, Inc.* v. *McHenry County Conservation District*, No. 02-CV-5147 (N.D. Ill. filed July 19, 2002) (2002 WL 31375502 (Oct. 21, 2002)).
56. *Tower Ventures, Inc.* v. *Town of Monson*, No. 02-CV-30005 (D. Mass. filed Jan. 9, 2002).
57. *U.S. Cellular Corp.* v. *Board of Adjustment of the City of Davenport*, No. 02-CV-10050 (S.D. Iowa filed May 16, 2002).
58. *United States Cellular* v. *Town of Brookfield*, No. 2:02-CV-00384 (E.D. Wis. filed Apr. 15, 2002).
59. *USCOC of Virginia RSA No. 3, Inc.* v. *Montgomery County Board of Supervisors*, No. 02-CV-01133 (W.D. Va. filed July 23, 2002) (245 F. Supp. 2d 817 (2003)).
60. *Voicestream Pitts.* v. *Board of Zoning Appeals*, No. 02-CV-108 (N.D. W.Va. filed Sept. 3, 2002).
61. *Wireless Solutions* v. *Saunders County Board of Supervisors*, No. 02-CV-00538 (D. Neb. filed Nov. 14, 2002).

62. *Wireless Solutions* v. *Saunders County Board of Supervisors*, No. 02-CV-00598 (D. Neb. filed Dec. 27, 2002).

Cases filed in 2003

63. *AB Cellular LA LLC* v. *City of Los Angeles*, No. 03-CV-02227-R (C.D. Cal. filed Mar. 31, 2003).
64. *AB Cellular LA LLC* v. *City of Santa Monica*, No. 03-CV-09129-DSF (C.D. Cal. filed Dec. 15, 2003).
65. *AB Cellular LA LLC* v. *City of Manhattan Beach*, No. 03-CV-02871 (C.D. Cal. filed Apr. 24, 2003).
66. *AT&T Wireless PCS LLP* v. *Town of Dartmouth*, No. 03-CV-10121 (D. Mass. filed Jan. 16, 2003).
67. *AT&T Wireless PCS* v. *Town of Charleston*, No. 03-421 (D. R.I. filed Sept. 17, 2003).
68. *AT&T Wireless PCS* v. *Town of Foster*, No. 03-287 (D. R.I. filed July 8, 2003).
69. *AT&T Wireless PCS* v. *City of Laconia*, No. 03-CV-00269 (D. N.H. filed June 19, 2003).
70. *AT&T Wireless PCS* v. *Town of New Shoreham*, No. 03-310 (D. R.I. filed July 21, 2003).
71. *AT&T Wireless PCS* v. *Zoning Board of Appeals*, No. 03-CV-00628 (N.D.N.Y. filed May 21, 2003).
72. *AT&T Wireless PCS* v. *Zoning/Planning Board*, No. 03-CV-04626 (D. N.J. filed Sept. 30, 2003).
73. *AT&T Wireless PCS, LLC* v. *Town of Acushnet*, No. 03-CV-12459 (D. Mass. filed Dec. 8, 2003).
74. *AT&T Wireless PCS, LLC* v. *Town of Billerica*, No. 03-CV-12105 (D. Mass. filed Oct. 30, 2003).
75. *AT&T Wireless PCS, LLC* v. *Town of Lakeville*, No. 03-CV-10921 (D. Mass. filed May 16, 2003).

76. *AT&T Wireless PCS, LLC* v. *Chester*, No. 03-CV-01888 (D. Conn. filed Nov. 4, 2003).
77. *AT&T Wireless PCS* v. *Town of New Shoreham*, No. 03-CV-00310 (D. R.I. filed July 21, 2003).
78. *AT&T Wireless PCS* v. *Town of Rutland*, No. 03-CV-40004 (D. Mass. filed Jan. 6, 2003).
79. *AT&T Wireless PCS* v. *Town of Suffield*, No. CV-660 (D. Conn. filed April 10, 2003).
80. *AT&T Wireless PCS, LLC* v. *Town of Warren*, No. 03-CV-40150 (D. Mass. filed July 10, 2003).
81. *Bay Area Cellular Telephone Co.* v. *City and County of San Francisco*, No. 03-CV-04866-PJH (N.D. Cal. filed Oct. 30, 2003).
82. *Cellco Partnership* v. *Town of North Andover*, No. 03-CV-10362 (D. Mass. filed Feb. 26, 2003).
83. *Cellular South Licensees, Inc.* v. *City of Batesville*, No. 03-CV-276 (N.D. Miss. filed Aug. 13, 2003).
84. *Cingular Wireless LLC* v. *City of Kenmore*, No. 03-CV-02974 (W.D. Wash. filed Oct. 6, 2003).
85. *Cingular Wireless LLC* v. *County of Thurston*, No. 03-CV-05400 (W.D. Wash. filed July 21, 2003).
86. *Industrial Communications & Electronics, Inc.* v. *Planning Board for the City of Fitchburg*, No. 03-CV-40130 (D. Mass. filed June 10, 2003).
87. *Los Angeles SMSA Ltd. Partnership* v. *City of Santa Monica*, No. 04-CV-03051 (C.D. Cal. filed Apr. 30, 2004).
88. *MCF Communications, Inc.* v. *Town of Stoughton*, No. 03-CV-12517 (D. Mass. filed Dec. 16, 2003).
89. *MetroPCS, Inc.* v. *City and County of San Francisco*, No. 03-CV-0617 (N.D. Cal. filed Feb. 12, 2003).

90. *Nextel Comms. of Mid-Atlantic, Inc.* v. *Town of Hanson*, No. 03-CV-12563 (D. Mass. filed Dec. 19, 2003) (311 F. Supp. 2d 142 (2004)).
91. *Nextel of California, Inc.* v. *City of Los Angeles*, No. 03-CV-00015 (C.D. Cal. filed Jan. 3, 2003).
92. *Nextel of New York* v. *City of Mount Vernon*, No. 03-CV-07175 (S.D.N.Y. filed Sept. 15, 2003).
93. *Omnipoint Comms., Inc.* v. *Village of Tarrytown Planning Bd.*, No. 03-CV-6344 (S.D.N.Y. filed Aug. 22, 2003) (302 F. Supp. 2d 205 (2004)).
94. *Omnipoint Holdings* v. *Town of Boxford*, No. 03-CV-10017 (D. Mass. filed Jan. 3, 2003).
95. *Omnipoint Holdings* v. *Town of North Andover*, No. 03-CV-10401 (D. Mass. filed Mar. 4, 2003).
96. *Omnipoint Holdings, Inc.* v. *Board of Zoning Appeals, Division Two of Marion County*, No. 03-CV-01048 (S.D. Ind. filed July 16, 2003).
97. *Omnipoint Holdings, Inc.* v. *City of Woburn*, No. 03-CV-10928 (D. Mass. filed May 16, 2003).
98. *Omnipoint Holdings, Inc.* v. *City of Woburn*, No. 03-CV-12030 (D. Mass. filed Oct. 21, 2003).
99. *Omnipoint Holdings, Inc.* v. *City of Woonsocket*, No. 03-350-S (D. R.I. filed Aug. 15, 2003).
100. *Omnipoint Holdings, Inc.* v. *Town of Danvers*, No. 03-CV-11888 (D. Mass. filed Sept. 26, 2003).
101. *Omnipoint Holdings, Inc.* v. *Town of Norwell*, No. 03-CV-10923 (D. Mass. filed May 16, 2003).
102. *Omnipoint Holdings, Inc.* v. *Town of Stoneham*, No. 03-CV-12133 (D. Mass. filed Oct. 31, 2003).
103. *Omnipoint* v. *Town of Fairfield*, No. 03-CV-01527 (D. Conn. filed Sept. 8, 2003).

104. *Pittsfield Cellular* v. *Town of Great Barrington*, No. 03-CV-30102 (D. Mass. filed Apr. 18, 2003).
105. *Powertel* v. *City of Statesboro*, No. 03-CV-68 (S.D. Ga. filed June 5, 2003).
106. *Powertel/Atlanta* v. *Coweta County*, No. 03-CV-11 (N.D. Ga. filed Jan. 16, 2003).
107. *Powertel/Atlanta* v. *Coweta County*, No. 03-CV-82 (N.D. Ga. filed June 19, 2003).
108. *Sacramento Valley Ltd. Partnership* v. *County of Sacramento*, No. 03-CV-1394 (E.D. Cal. filed June 30, 2003).
109. *Sprint PCS Assets, LLC* v. *City of La Canada Flintridge*, No. 03-CV-039 (C.D. Cal. filed Jan. 15, 2003).
110. *Sprint PCS Assets, LLC* v. *La Canada Flintridge*, No. 03-CV-296 (C.D. Cal. filed Mar. 20, 2003).
111. *Sprint PCS Assets* v. *Palos Verdes Estates*, No. 03-CV-825 (C.D. Cal. filed May 22, 2003).
112. *Sprint Spectrum L.P.* v. *City of Lowell*, No. 03-CV-11219 (D. Mass. filed July 29, 2003).
113. *Sprint Spectrum L.P.* v. *Town of Stony Point*, No. 03-CV-09474 (S.D.N.Y. filed Nov. 26, 2003).
114. *Sprint Spectrum L.P.* v. *Village Of Brewt*, No. 03-CV-08399 (S.D.N.Y. filed Oct. 23, 2003).
115. *Sprint Telephony PCS* v. *City of La Mesa*, No. 03-CV-1994 (S.D. Cal. filed Oct. 8, 2003).
116. *Sprint Telephony PCS* v. *County of San Diego*, No. 03-CV-1398 (S.D. Cal. filed July 15, 2003).
117. *USCOC of Greater Iowa, Inc.* v. *City of Bellevue*, No. 03-CV-3197 (D. Neb. filed May 28, 2003) (279 F. Supp. 2d 1080 (2003)).

118. *USCOC of New Hampshire RSA No. 2 (US Cellular)* v. *City of Concord*, No. 03-61-JM (D. N.H. filed Feb. 14, 2003).

119. *VoiceStream Minneapolis, Inc.* v. *Washburn County*, No. 03-C-0556-C (W.D. Wis. filed Oct. 6, 2003).

120. *Voice Stream PCS I, LLC* v. *City of Hillsboro*, No. 03-CV-365 (D. Or. filed Mar. 21, 2003) (301 F. Supp. 2d 1251 (2004)).

Cases filed in 2004 (Jan.-June)

121. *Powertel/Atlanta, Inc.* v. *Habersham County*, No. 04-CV-56 (N.D. Ga. filed Mar. 17, 2004).

122. *Cellco Partnership* v. *Board of Supervisors of Roanoke County*, No. 7:04-CV-00029-SGW (W.D. Va. filed Jan. 14, 2004).

123. *Cincinnati Bell Wireless, LLC* v. *City of Cincinnati*, No. 104-CV-00192-SSB-TSB (S.D. Ohio filed Mar. 9, 2004).

124. *Cingular Wireless LLC* v. *Thurston County*, No. 04-CV-05009 (W.D. Wash. filed Jan. 12, 2004).

125. *GTE Mobilnet of California Ltd. Partnership* v. *City and County of San Francisco*, No. 04-CV-02534-SI (N.D. Cal. filed June 24, 2004).

126. *Los Angeles SMSA Ltd. Partnership* v. *City of Santa Monica*, No. 04-CV-00378-JVS (C.D. Cal. filed Apr. 1, 2004).

127. *Nextel Communications of the Mid-Atlantic Inc.* v. *Russell's Garden Center, Inc.*, No. 04-CV-10290 (D. Mass. filed Feb. 11, 2004).

128. *Nextel of New York, Inc.* v. *Town of Ramapo*, No. 04-CV-04402 (S.D.N.Y. filed 10, 2004).

129. *Nextel of New York, Inc.* v. *Village of Bronxville*, No. 04-CV-02523 (S.D.N.Y. filed Apr. 1, 2004).

130. *Omnipoint Communications, Inc.* v. *City of Mount Vernon*, No. 4-CV-04129 (S.D.N.Y. filed June 2, 2004).

131. *Omnipoint Holdings* v. *Miami-Dade County*, No. 04-CV-21441 (S.D. Fla. filed June 18, 2004).

132. *Omnipoint Holdings, Inc.* v. *City of Somerville*, No. 04-CV-10713 (D. Mass. filed Apr. 9, 2004).

133. *Omnipoint Holdings, Inc.* v. *Town of Manchester by the Sea*, No. 04-CV-11460 (D. Mass. filed June 25, 2004).

134. *Omnipoint Holdings, Inc.* v. *City of Woonsocket*, No. 04-239 (D. R.I. filed June 16, 2004).

135. *Omnipoint Holdings, Inc.* v. *Town of Saugus*, No. 04-CV-10737 (D. Mass. filed Apr. 12, 2004).

136. *Sacramento Valley Ltd. Partnership* v. *City of Davis*, No. 04-CV-744 (E.D. Cal. filed Apr. 14, 2004).

137. *Southwestern Bell Mobile Systems, LLC* v. *Clark*, No. 04-CV-40003 (D. Mass. filed Jan. 9, 2004).

138. *Southwestern Bell Mobile Systems, LLC* v. *Nestler*, No. 04-CV-40004 (D. Mass. filed Jan. 9, 2004).

139. *Sprint Spectrum L.P.* v. *Zoning Board of Appeals of the City of Stamford*, No. 04-CV-00540 (D. Conn. filed Apr. 1, 2004).

140. *Sprint Spectrum, L.P.* v. *Township of Brandon*, No. 04-CV-72159 (E.D. Mich. filed June 9, 2004).

141. *Sprint Spectrum, L.P.* v. *Town of Oyster Bay*, No. 04-CV-01552 (E.D.N.Y. filed Apr. 15, 2004).

142. *Sprint Spectrum, L.P.* v. *City of Lawrence*, No. 04-CV-10813 (D. Mass. filed May 6, 2004).

143. *Sprint Telephony PCS* v. *City of Carlsbad*, No. 04-CV-467 (S.D. Cal. filed Mar. 5, 2004).

144. *Voicestream PCS II Corporation* v. *St. Louis, Missouri*, No. 04-CV-00732 (E.D. Mo. filed June 14, 2004).

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No. 03-1601

In the
Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, OHIO, OREGON, TEXAS, UTAH, VERMONT, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§1983 and 1988. *See* Pet. at i.

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AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001) 4, 18

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New Par v. City of Saginaw, 301 F.3d 390 (6th Cir. 2002) 16, 17

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INTEREST OF AMICI CURIAE

In the decision below, the Ninth Circuit held, in contrast with the Third and Seventh Circuits, that the remedial scheme established by 47 U.S.C. §332(c)(7), which addresses the siting and construction of wireless communication facilities, is not sufficiently "comprehensive" within the meaning of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to preclude enforcement through the generic cause of action created by 42 U.S.C. §1983. The amici States' interests in this case are threefold.

First, the Communications Act provisions at issue apply by their terms not just to municipalities (like petitioner here) but also to State governments and their officers. *See* C. Jacques & J. Beerman, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735, 751-52 (2001) ("The [Telecommunications Act] repeatedly refers to 'State or local' governments, thus explicitly placing obligations on states."). Of principal importance here, §332(c)(7) prescribes an express private cause of action against any "*State* or local government or any instrumentality thereof." *Id.* §332(c)(7)(B)(v) (emphasis added). Accordingly, even aside from the symbiotic relationship that exists generally between cities and States, *see City of Leeds v. Town of Moody*, 319 So. 2d 242, 246 (Ala. 1975) ("Municipalities are mere instrumentalities of the state possessing only such powers as may have been delegated to them by the legislature."), §332's plain text expressly brings States and their officers – as such – within its ambit. And while it may typically be the case (as it is here) that local governments deal with the placement and construction issues to which §332(c)(7) applies, that is not necessarily – nor will it always be – the case.

Second, §332(c)(7) does not exist in a vacuum. Rather, as the petition correctly points out, §332(c)(7) "forms part of the Communications Act's comprehensive regulatory

scheme." Pet. at 21. As they have done when addressing §332(c)(7), lower courts have disagreed whether other provisions of the Act – provisions that directly target States and their officers – entail sufficiently "comprehensive" remedial schemes to preclude resort to §1983's general terms under *Sea Clammers*. With respect to 47 U.S.C. §252, which provides a cause of action against state public service commissioners in connection with the negotiation and enforcement of interconnection agreements, compare *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002) (rejecting §1983 suit under *Sea Clammers*), with *MCI Telecomm. Corp. v. Southern New England Tele. Co.*, 27 F. Supp. 2d 326, 334 (D. Conn. 1998) (permitting §1983 suit). With respect to 47 U.S.C. §253, which deals with telecommunications providers' uses of public rights-of-way, compare *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305, 1315 (D.N.M. 2002) (rejecting §1983 suit under *Sea Clammers*), with *Sprint Tele. PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 913-15 (S.D. Cal. 2004) (permitting §1983 suit). The amici States are concerned that the Ninth Circuit's decision below that §332(c)(7)'s remedial scheme is insufficiently comprehensive to preclude resort to §1983 will have ripple effects in other provisions of the Communications Act and thus expose state officers and employees to unexpected personal §1983 liability.

Third, and perhaps most importantly, the amici States, whose officers and employees are perhaps the most frequent defendants in suits brought under §1983, have a keen interest in preventing the unwarranted extension of §1983 into areas governed by other, more specific remedial regimes. The *Sea Clammers* rule – like, amici will show, the rule of *Preiser v. Rodriguez*, 411 U.S. 475 (1973) – serves the important function of precluding plaintiffs from invoking §1983's open-ended remedial regime where Congress has exercised its prerogative to establish a more specific, and more limited, cause of action. Just as the States have intervened to defend and preserve the *Sea Clammers* rule before, *see, e.g.*, Br. of Amici Curiae States of Illinois et al. at 16-22, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679); Br. of Amici Curiae States of Illinois et al. at 19-25, *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441), they do so here.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Resolve the Clear Circuit Split Concerning the Propriety of Enforcing the Communications Act Through Section 1983 and To Clarify the Meaning and Scope of the *Sea Clammers* Decision.

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. §332(c)(7), prescribes an express private cause of action to redress violations of the Act's wireless communications equipment-siting provisions:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis ....

Id. §332(c)(7)(B)(v).

1. As the petition demonstrates, the courts of appeals (and the district courts, for that matter) are divided over the question whether the private cause of action detailed in §332(c)(7) is sufficiently "comprehensive" within the meaning of this Court's decision in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to preclude resort to the generic cause of action set forth in 42 U.S.C. §1983. *See* Pet. at 12-20. The Third and Seventh Circuits say yes; the Ninth and Eleventh Circuits (the latter in a now-vacated opinion) say no. *Compare Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d

687 (3d Cir. 2002), *and PrimeCo Personal Comms. Ltd. P'ship v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003), *with Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004) (Pet. App. 1a-12a), and *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001). The circuit split has been openly acknowledged by the relevant players: In the decision below, the Ninth Circuit expressly rejected the Third Circuit's "reasoning [as] flawed in several respects." Pet. App. 8a. The Third Circuit, for its part, had earlier "respectfully disagree[d] with the reasoning" of the Eleventh Circuit. *Nextel Partners*, 286 F.3d at 695.

What is more, the divide in the circuits is not just about results, with some permitting Communications-Act plaintiffs to seek damages and fees under §1983 and others refusing. Rather, the divide runs deep, and reflects a fundamental disagreement about the meaning of this Court's decision in *Sea Clammers* and – deeper still – about the operation of §1983 itself.

Section 1983's language, of course, is broad. It provides that any person who, acting under the color of state law, deprives another of "his rights, privileges, or immunities secured by the Constitution and laws," shall be liable "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. Particularly relevant here, §1983 permits suits alleging deprivations of rights secured by the "laws" of the United States. In 1980, this Court held that §1983's "and laws" clause authorizes suits to redress violations by state officials of rights created by federal statutes. *See Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

This Court has also made clear, though, that §1983's broad language cannot be read literally, else it would swallow up – and displace – other, more specific remedial schemes. Perhaps most notable in this respect have been this Court's decisions concerning the "intersection," or "overlap," of §1983 and the federal habeas corpus statute,

28 U.S.C. §2254. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 124 S. Ct. 1303 (2004). In the first in that line of cases, *Preiser v. Rodriguez*, this Court faced §1983 suits by state prisoners seeking the restoration of good-time credits they claimed had been unconstitutionally revoked. The inmates had sued under §1983 to avoid having to exhaust their state remedies, as the habeas statute expressly requires, *see* 28 U.S.C. §2254(b). "The question before us," this Court said, "is whether state prisoners seeking such redress may obtain equitable relief under [§1983], even though the federal habeas corpus statute, 28 U.S.C. §2254, clearly provides a specific federal remedy." 411 U.S. at 477. In answering that question in the negative, the Court stressed that "[t]he broad language of §1983 is not conclusive ...." *Id.* at 489. Emphasizing that "[t]he [§1983] statute is a general one," the Court held that, "despite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute ... must be understood to be the exclusive remedy in a situation like this where it so clearly applies." *Id.*

This case presents a similar issue, albeit in a different context. Under what circumstances is §1983 available to a plaintiff claiming that a state or local official deprived him of a right created by a federal statute? And more specifically, when may a plaintiff resort to §1983's generic cause of action rather than utilize the specific cause of action – and accompanying procedures and remedies – available to him under the statute he seeks to enforce? Just a year after its decision in *Thiboutot* recognizing that §1983 authorizes suits for violations of federal statutes, this Court in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, recognized an important exception to the application of §1983 to statutory violations. Specifically, the Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983." *Id.* at 20. Accordingly, the *Sea*

Clammers Court emphasized, when "'a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983.'" *Id.* (citation omitted).

2. The division in the courts of appeals that underlies the current petition reflects a fundamental disagreement concerning what makes a statute's enforcement scheme "comprehensive" within the meaning of *Sea Clammers*. For its part, the Ninth Circuit has adopted what we, for ease of analysis, will call a "more is better" approach to *Sea Clammers*' comprehensiveness criterion; it views a comprehensive statutory scheme as one that is extensive, and specifically one that provides plaintiffs with a host of remedial options. In finding §332(c)(7)'s remedial scheme not to be comprehensive under *Sea Clammers*, the Ninth Circuit emphasized its view that the section's "[s]hortening [of] the statute of limitations to thirty days imposes a burden on an aggrieved plaintiff, not a benefit," and that "[t]he only benefit to an aggrieved plaintiff" under the section is expedited judicial review. Pet. App. 8a; *see also id.* at 9a (referring to §332(c)(7) as "limiting the plaintiff's remedies"). Furthermore, and consistent with its understanding that a comprehensive remedial scheme should maximize a plaintiff's remedial options, the Ninth Circuit reasoned from the absence in §332(c)(7) of any provision for monetary damages *not* that damages are unavailable in suits seeking to enforce §332(c)(7), but instead that damages (and fees) may be had through resort to §1983: "While one may argue that the lack of any damages [remedy] in the [Telecommunications Act] is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a. Thus, in the Ninth Circuit's view, the fact that a statute limits a plaintiff's remedies – whether expressly (as by imposing a short limitations period) or implicitly (as by omitting an express damages provision) – in and of

itself indicates that the statute's scheme is not comprehensive under *Sea Clammers*, and that §1983 thus remains available.

As its decision in *Nextel Partners* demonstrates, the Third Circuit has taken a fundamentally different view – which we will call the "internal coherence" view – of *Sea Clammers*' comprehensiveness criterion. In finding §332(c)(7)'s remedial scheme to be sufficiently comprehensive to preclude resort to §1983, the Third Circuit acknowledged that the scheme "is not complicated." 286 F.3d at 694. But, the court emphasized, it is "comprehensive in the relevant sense," namely, in that it "provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* Specifically, the Third Circuit emphasized that while §332(c)(7) "requires that [an] action be filed within a very short period – 30 days – after an adverse decision or failure to act," it also "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Id.* at 695. Section 332's "streamlined review," the court said, "may work to the benefit of plaintiffs and defendants in different ways." *Id.* The Third Circuit also "f[ound] it important" to its determination of comprehensiveness that the Communications Act, unlike §1983's counterpart §1988, "makes no provision for attorney's fees," and thus under the prevailing "American rule" does not permit fee-shifting. *Id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994), and *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-62 (1975)).

Accordingly, whereas the Ninth Circuit viewed §332(c)(7)'s "burden[s]" and "limit[ations]" on a plaintiff's right of recovery as evidence that the statute's remedial scheme is not comprehensive, the Third Circuit, working from the same premises, drew precisely the opposite conclusion. For the Third Circuit, the issue was not simply whether §1983 is a better deal for plaintiffs than the Communications Act. Rather, the Third Circuit looked to whether the remedial regime established by

§332(c)(7) is self-contained – in the sense that it provides a private cause of action with an attendant "package" of remedies and requirements – and whether resort to §1983's generic scheme would undermine §332(c)(7)'s more specific scheme. Using those criteria, the Third Circuit found that §1983 was not available. Specifically, it found that (i) a plaintiff suing under §1983 "would be freed of [§332(c)(7)'s] short 30-day limitations period and would instead presumably have four years to commence the action"; (ii) the court in a §1983 suit "would also presumably be freed of [§332(c)(7)'s] obligation to hear the claim on an expedited basis"; and (iii) "[p]erhaps most important, attorney's fees would be available" under §1983, while not under §332(c)(7). *Nextel Partners*, 286 F.3d at 695. In sum, the Third Circuit concluded that "[a]llowing plaintiffs to assert [Telecommunications Act] claims under §1983 would upset th[e] balance" – the balance, that is, of *both* benefits *and* burdens – that Congress struck when it enacted §332(c)(7). *Id.* at 694.

3. The Third and Ninth Circuits' sharply divergent approaches to *Sea Clammers*' comprehensiveness criterion may well result from loose language contained in a couple of this Court's own post-*Sea Clammers* decisions. At first blush (though, as we will show, not upon reflection, *see infra* at 10-14), language in *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987), and *Blessing v. Freestone*, 520 U.S. 329 (1997), might seem to support the Ninth Circuit's "more is better" view of comprehensiveness. In holding that the statute before it could be enforced through §1983, the Court in *Wright* observed that the statute's remedial mechanisms were not "sufficiently comprehensive *and effective*" to justify the inference that Congress sought to foreclose §1983 enforcement. 479 U.S. at 425 (emphasis added). In the same vein, the Court in *Blessing* characterized *Sea Clammers* as having involved a statute with "a panoply of enforcement options" and noted that the "enforcement arsenal" provided by the statute before it did "not compare to" those at issue in *Sea Clammers*. *Id.* at 347-48.

Smith v. Robinson, 468 U.S. 992 (1984), by contrast, clearly indicates a measure of comprehensiveness more consistent with the Third Circuit's understanding. In *Smith*, this Court faced a question similar to the one presented here. Could a plaintiff recover attorney's fees under §1983's fee-shifting provision, §1988, on an equal protection claim relating to the Education of the Handicap Act's requirement of a "free and appropriate public education"? Or, instead, was the EHA's remedial scheme, which provided for administrative and judicial review but did not authorize fee awards, exclusive of §1983. In holding that the EHA precluded resort to §1983, this Court emphasized that the EHA embodied a "carefully tailored scheme." 468 U.S. at 1012. Plainly, the Court in *Smith* did not conclude that the EHA's scheme was comprehensive in the Ninth Circuit's "more is better" sense; the whole point of the case was that §1983 permitted attorney's fees (and damage awards), while the EHA did not. *See id.* at 1009-13, 1019-20 & n.24. But the Court nonetheless *did* find that the "procedures and guarantees" set out in the EHA were "comprehensive," *id.* at 1011, and, further, that "Congress did not intend to have the EHA scheme" – including the limitations on recovery embodied in that scheme – "circumvented by resort to the more general provisions of §1983," *id.* at 1016.

* * *

This Court's review is thus triply warranted here. First, there is a clear and acknowledged circuit split concerning the specific question presented – whether 47 U.S.C. §332(c)(7) embodies a "comprehensive" remedial scheme that under *Sea Clammers* precludes resort to the more general cause of action created by §1983. Second, that split runs much deeper than the specific question presented and actually reflects a fundamental cleavage in the circuits over what it means for a remedial scheme to be "comprehensive" within the meaning of *Sea Clammers* – namely, whether a comprehensive scheme is one that maximizes a plaintiff's remedial options, or, instead, one

that is coherent, self-contained, and in some sense incompatible with §1983's remedial regime. Finally, the courts' divergent approaches to the comprehensiveness question at least arguably result from the sometimes mixed signals that this Court has sent in the wake of *Sea Clammers*. This Court should step in to bring order to this important area of the law.

II. The Ninth Circuit's Decision Is Inconsistent With *Sea Clammers*, With This Court's Decisions in Related Contexts, and With Common Sense.

The Third Circuit's approach to *Sea Clammers*' comprehensiveness criterion – namely, that a statute's remedial regime is sufficiently comprehensive to preclude resort to §1983 if it is both self-contained and materially different from §1983 – is superior to the Ninth Circuit's "more is better" approach in every relevant respect. The Ninth Circuit's decision here and the rationale that underlies it are inconsistent with (i) the decisions in *Sea Clammers* and its progeny; (ii) this Court's approach to conflicts between §1983 and other specific statutory schemes; and (iii) indeed, simple common sense.

1. *The* Sea Clammers *Cases*. The logic underlying the Ninth Circuit's specific decision concerning §332(c)(7) is inconsistent with the best understanding of this Court's decisions in *Sea Clammers* and its progeny. In concluding that §332(c)(7)'s remedial scheme is not sufficiently comprehensive to preclude resort to §1983, the Ninth Circuit focused on the limitations that §332(c)(7) places on a plaintiff's right of recovery. As an initial matter, the court emphasized that, in its view, the "only benefit to an aggrieved plaintiff" under §332(c)(7) is expedited judicial review and that the section's 30-day limitations period "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. Further, and more tellingly, the court assumed from §332(c)(7)'s silence concerning monetary damages – and, presumably, attorney's fees, as well – that Congress intended to preserve §1983 as a

vehicle for obtaining those forms of relief. With respect to that point the court asserted that "[w]hile one may argue that the lack of any damages [remedy] in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a.

The Ninth Circuit's reasoning – that limitations on a plaintiff's right of recovery under a statute's remedial scheme render that scheme insufficiently comprehensive to preclude §1983 enforcement – cannot be squared with *Sea Clammers* or with the cases that follow it. The plaintiffs in *Sea Clammers* sued under §1983 for monetary damages stemming from violations of federal environmental statutes. By invoking §1983, the plaintiffs sought primarily to circumvent two specific restrictions embodied in those statutes: (i) a requirement that they give the defendants and the EPA 60 days notice before filing suit; and (ii) the statutes' authorization of prospective injunctive, but not monetary, relief. *See Sea Clammers*, 453 U.S. at 4, 6-7. Thus, the perceived limitations in the remedial schemes at issue in *Sea Clammers* were similar to those the Ninth Circuit found decisive here – namely, (i) the 30-day filing period and (ii) the lack of any statutory damages remedy. But while the Ninth Circuit concluded that those limitations rendered §332(c)(7)'s remedial scheme insufficiently comprehensive to preclude resort to §1983, this Court in *Sea Clammers* reached precisely the opposite conclusion. It held that the environmental statutes' remedial schemes *were* comprehensive despite the restrictions on recovery. Indeed, with respect to those restrictions, the *Sea Clammers* Court expressly emphasized that "the requirements of th[ose] enforcement procedure[s] may not be bypassed by bringing suit directly under §1983." *Id.* at 20 (internal quotation marks omitted).

Nor can the Ninth Circuit's decision here be reconciled with *Smith v. Robinson*, 468 U.S. 992. As noted above,

the plaintiffs there had sued to enforce their rights under the Education of the Handicapped Act and the Fourteenth Amendment. Because, like the §332(c)(7) here, the EHA was silent as to attorney's fees – it gave "no indication that attorney's fees [we]re available in an action to enforce [its] requirements," *id.* at 1006 – the plaintiffs in *Smith* (like the respondent, Mr. Abrams, here) sought fees under §1983's fee-shifting provision, §1988. This Court rejected that move. Despite the lack of any provision for fees in the EHA's remedial regime, this Court found that regime to be "comprehensive" and refused the plaintiffs' effort to "circumvent" the EHA's "carefully tailored scheme" by seeking fees directly through §1983. 468 U.S. at 1012. Notably for present purposes, this Court in *Smith* observed (echoing the First Circuit's decision, which it affirmed) that *Sea Clammers* supports the "general proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme" – like the absence of any provision for the payment of attorney's fees – "should not be supplanted by the remedial apparatus of §1983." *Id.* at 1003.

Finally, neither *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), nor *Blessing v. Freestone*, 520 U.S. 329, supports the Ninth Circuit's decision. This Court found the statutes at issue in those cases insufficiently comprehensive to preclude resort to §1983 because they provided only for administrative enforcement by executive agencies (for instance, through the withholding of federal funds); none authorized a private cause of action through which an aggrieved individual himself could seek redress in court. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 427. Indeed, this Court in *Wright* distinguished *Sea Clammers* and *Smith* on the ground that the statutes at issue in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the §1983 remedy." *Id.*; *see also id.* at 423 (*Sea Clammers* involved "scheme that

itself provided for private actions"); *id.* (*Smith* concerned remedial scheme "which itself allowed private parties to seek remedies for violating federal law"). *Wilder* and *Blessing* are to the same effect. In the former, the Court, contrasting *Sea Clammers* and *Smith*, observed that the statute before it "contain[ed] no comparable provision for private judicial or administrative enforcement," 496 U.S. at 521; in the latter, the Court likewise emphasized that "[u]nlike the federal programs at issue" in *Sea Clammers* and *Smith*, the statute before it "contain[ed] no private remedy – either judicial or administrative – through which aggrieved persons can seek redress." 520 U.S. at 348.

The remedial schemes at issue in *Wright*, *Wilder*, and *Blessing* are all fundamentally different from §332(c)(7). Whereas those cases "involved statutes that relied on executive branch enforcement with little, if any, possibility for private enforcement," §332(c)(7) *"relies entirely on private enforcement."* Jacques & Beerman, *supra* at 1, at 754 (emphasis added). Here, the Ninth Circuit itself acknowledged that §332(c)(7) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction ...." Pet. App. 5a-6a. Under this Court's decisions, that fact precludes suit under §1983; the fact that §332(c)(7)'s cause of action is in some sense circumscribed – for instance, by requiring suit within 30 days and by not providing for damage awards and attorney's fees – does not, as the Ninth Circuit assumed, detract from its comprehensiveness.

This Court's decisions – from *Sea Clammers* to *Blessing* – establish a clear rule: Where Congress goes to the trouble of expressly establishing in a substantive statute a private cause of action through which an aggrieved party can seek redress in court (as it did in *Sea Clammers* and *Smith* but did not in *Wright*, *Wilder*, or *Blessing*), the specific procedures, remedies, and restrictions prescribed by that statute govern the operation of the cause of action, and may not be

circumvented through resort to §1983's general terms. Having acknowledged that §332(c)(7) expressly provides aggrieved plaintiffs a cause of action through which to enforce their rights, the Ninth Circuit, by allowing resort to §1983, went on to sanction the very sort of end run that this Court's decisions prohibit.

2. *The* Preiser *Cases.* The Ninth Circuit's "more is better" approach is also fundamentally inconsistent with the way this Court has dealt with §1983's interaction with other federal statutes. The principle that emerges from the *Sea Clammers* line of cases – that where Congress has expressly created a private cause of action and assigned to it particular procedures, remedies, and limitations, a plaintiff cannot circumvent those specific rules through resort to §1983 – is part of a bigger picture. Under the banner that a "specific" statute should be read to govern the "general," this Court has enforced similar rules to foreclose §1983 suits in other contexts.

As noted at the outset of this brief, the most notable "intersection" that this Court has made an effort to police has been the one between §1983 and the federal habeas corpus statute, 28 U.S.C. §2254. The question in those cases has never been whether the habeas statute is sufficiently beneficial or advantageous to the complaining inmate (with the result that, if not, §1983 steps in to provide a more robust remedy). In fact, just the opposite is true. The fundamental question in that line of cases has been whether an inmate may circumvent a specific *limitation* on the habeas statute's express cause of action – typically, the requirement that he exhaust state remedies, *see* 28 U.S.C. §2254(b) – by resort to the more general, and more permissive, §1983. *See, e.g., Heck*, 512 U.S. at 480-81; *Preiser*, 411 U.S. at 489-90. This Court has consistently answered no. In *Preiser*, the Court held that "[i]t would wholly frustrate explicit congressional intent to hold that [inmates] could evade [the habeas statute's] requirement[s] by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. Rather, the Court emphasized, where it "clearly

applies," the specific habeas statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – "must be understood to be the exclusive remedy available ...." *Id.* at 489; *see also Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ....").

The Ninth Circuit's analysis here invites the very "frustrat[ion] of explicit congressional intent" that this Court has condemned in the *Preiser* line of cases. *See* Jacques & Beerman, *supra* at 1, at 750 (noting the similarities between §1983's interaction with §332(c)(7) and the habeas statute). Again, citing the short 30-day statute of limitations (which it called "a burden on an aggrieved plaintiff, not a benefit") and the "lack of any damages" remedy (or provision for fees), the Ninth Circuit found §332(c)(7)'s remedial scheme not to be comprehensive and, accordingly, held that §1983 must be available. Pet. App. 8a. And again, with respect to the latter issue, the court expressly assumed that the absence of any express provision in the Communications Act for damages implied *not* that Congress "intended to foreclose damages," but instead that Congress "intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a. But that is akin to saying that because the federal habeas statute imposes an exhaustion requirement, *see* 28 U.S.C. §2254(b), or (like §332(c)(7)) does not authorize damage awards, *see Preiser*, 411 U.S. at 494, inmates must be able to invoke §1983, which entails neither limitation. This Court has squarely – and repeatedly – rejected that view. *See, e.g., Heck*, 512 U.S. at 483-87; *Preiser*, 411 U.S. at 489-90. The same considerations counsel rejection of the logic underlying the Ninth Circuit's decision here.

3. *Common Sense.* Finally, and with respect, the logic underlying the Ninth Circuit's decision in this case defies common sense. Taken to its logical extreme, the Ninth Circuit's view seems to be that *any* restriction on a plaintiff's ability to recover under a substantive statute's

cause of action – whether a short limitations period, the absence of a damages remedy or fees, or some other restriction – as a basis for finding that §1983 remains available.

But by that logic, the whole *Sea Clammers* line of cases evaporates. If, as the Ninth Circuit's decision suggests, any supposed limitation in a substantive statute's remedial scheme could be bridged by resort to §1983, then *Sea Clammers* would have no independent force at all; a statute's remedial scheme would be sufficiently comprehensive to preclude resort to §1983 only when it provided the full complement of remedies (*e.g.*, injunctions, damages, fees, generous statute of limitations) that are available under §1983 – that is, *only when resort to §1983 would be wholly unnecessary and superfluous*. Like the *Preiser* rule that preceded it, the *Sea Clammers* rule has bite only when it is used to enforce – and to prevent plaintiffs from "bypass[ing]"or "circumvent[ing]" – limits embodied in substantive statutes' remedial schemes. *Smith*, 468 U.S. at 1012; *Sea Clammers*, 453 U.S. at 20. By using those same limits (here, a short statute of limitations and the absence of a damages remedy) to justify dispensing with the *Sea Clammers* rule and permitting resort to §1983, the Ninth Circuit's decision actually extinguishes the *Sea Clammers* rule altogether.

* * *

There is one final point that should be made explicit. Not only is resort to §1983 in this case inconsistent with *Sea Clammers*, but it is also unnecessary to the vindication of would-be wireless operators' rights with respect to the siting and construction of telecommunications facilities. In case after case, wireless operators have sued to enforce their rights under §332(c)(7) – and won – without relying on §1983. *See, e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403 (3d Cir. 1999); *Cellular Tele. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *see also* Jacques & Beerman, *supra* at 1, at 754 & n.102 (collecting district court cases). Further, the courts of appeals have held (to our knowledge, uniformly) that injunctive relief – specifically, an order directing the relevant state or local zoning authority to permit construction – is available under §332(c)(7). *See New Par*, 301 F.3d at 399-40; *National Tower*, 297 F.3d at 21-22; *Preferred Sites*, 296 F.3d at 1221-22; *Omnipoint*, 181 F.3d at 410; *Town of Oyster Bay*, 166 F.3d at 497.[1] Indeed, it bears emphasis that the respondent here, Mr. Abrams, prevailed on his §332(c)(7) claim in the district court, which entered a "judgment of injunction" expressly "enjoin[ing], mandat[ing] and compell[ing]" the City to "set aside its earlier resolution denying plaintiff's application" and to "adopt a new resolution granting" that application. Pet. App. 13a-14a.

If, as seems clear, wireless operators like Mr. Abrams can obtain the regulatory approvals they seek through suits for injunctive relief directly under §332(c)(7), what is fueling the recent rush to §1983? The answer seems to us plain enough, but perhaps needs to put out into the open. The answer is *attorney's fees*. Pursuant to the so-called "American rule" (*see supra* at 7), attorney's fees are not available under §332(c)(7); 42 U.S.C. §1988, by contrast, expressly authorizes fee awards in suits brought under §1983. Plaintiffs' lawyers thus have an obvious preference for §1983 over §332(c)(7), and an obvious incentive to file their §332(c)(7) suits under §1983's cover. But for two reasons, paying plaintiffs' lawyers' attorney's fees seems to us a hollow (if not perverse) reason for chucking the specific cause of action that Congress established in §332(c)(7) in favor of §1983's more liberal scheme.

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[1] The Ninth Circuit's suggestion that §332(c)(7) "contain[s] no remedies at all" and "does not provide for any type of relief" (Pet. App. 6a, 7a-8a) is thus plainly wrong.

First, as Judges Posner and Carnes have both pointed out using colorful language, the telecommunications conglomerates that are typically (though concededly not here) the plaintiffs in §332(c)(7) cases hardly fit the mold of the civil-rights victims Congress had in mind when it enacted §1988. *See PrimeCo Personal Comms. Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (Posner, J.) (emphasizing that whereas §1988 was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers in cases whose political significance may dwarf the monetary stakes," the Communications Act "creates rights in telecommunications enterprises," which "have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes"); *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir. 2000) (Carnes, J., concurring), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001) (noting that whereas "Section 1988 was intended to help the civil rights Davids of the world do battle with the governmental Goliaths," telecommunications companies' "financial self-interest and the vast sums at stake make them more than happy to serve as 'private attorneys general' to enforce the legislative measures that they have lobbied through Congress").

Second, this Court has often remarked (with regret) the tendency of attorney's-fees requests to "result in a second major litigation." *E.g.*, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 (2001); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The risk of cases bogging down in disputes over fees is particularly acute in the current context given Congress' stated purpose of "encourag[ing] the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), and §332(c)(7)(v)'s express requirement that equipment-siting

disputes be resolved "expedit[iously]." Indeed, in the light of these concerns, the Eleventh Circuit has emphasized "the developing case law" holding that simple *injunctive* relief – the form of relief that the courts have uniformly held is available under §332(c)(7) itself, *see supra* at 17 – "best serves the [Communications Act's] explicit goal of expediting resolution of this type of action." *Preferred Sites*, 296 F.3d at 1222 n.13.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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In The Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE LOCAL GOVERNMENTS AND RELATED ASSOCIATIONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

[Amici Listed on Inside Cover]

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STATEMENT OF INTEREST

Local Government Amici support the petition for a writ of certiorari filed by the City of Rancho Palos Verdes and the City Council of the City of Rancho Palos Verdes (hereinafter jointly referred to as the "City").[1]

The League of California Cities is an association of 478 of California's 479 cities united in promoting the general welfare of cities and their citizens. The California State Association of Counties is an association of all 58 California counties. Its primary purpose is to represent county government before the California legislature, administrative agencies, and the federal government. These entities also monitor appellate litigation and identify those cases that are significant to California cities and counties, including this one.

The League of Oregon Cities is an association of 238 of the state's 240 incorporated cities. Its mission is to strengthen and support livable communities in the state. The Association of Oregon Counties is a volunteer-membership organization that represents all 36 Oregon counties. Its mission is to strengthen county government's ability to serve people.

The Montana Association of Counties is an organization representing all 56 Montana counties. It is authorized by law to represent the boards of county commissioners for the furtherance of good government and the protection of county interests.

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[1] In accordance with Rule 37.6, Local Government Amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than Local Government Amici, their counsel and members made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties, and letters of consent are being filed under Rule 37.2.

The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, and the Washington Chapter of the National Association of Telecommunications Officers and Advisors represent the telecommunications needs and interests of local governments in the states of California, Nevada, and Washington.

The City and County of San Francisco and the City of Los Angeles are charter cities in the State of California. Both cities are defendants in lawsuits challenging the denials of applications for permits to construct wireless facilities. In addition, both cities expect to continue to be inundated with applications for permits to construct wireless facilities.

Local Government Amici have a direct interest in this case. If the decision of the Ninth Circuit is allowed to stand, it would have a detrimental effect on the ability of local governments to rely on local zoning codes to regulate the use of private property to construct wireless facilities.

In 47 U.S.C. § 332(c)(7), Congress preserved local zoning authority over wireless facilities siting subject to certain limitations. Congress also authorized wireless telecommunications carriers to sue local governments in court to challenge denials of applications to construct wireless facilities. In the decision below, the Ninth Circuit Court of Appeals held that the remedial scheme Congress established in Section 332(c)(7) is not sufficiently comprehensive to preclude claims for damages under 42 U.S.C. § 1983 and for attorney's fees under 42 U.S.C. § 1988.

Wireless carriers continue to file applications for permits to construct wireless facilities in the communities represented by Local Government Amici. A decision to approve the construction of a wireless facility is irrevocable. Concerns that local governments would be required to pay wireless carriers damages and attorney's fees, for

what amounts to nothing more than an erroneous zoning decision, could prevent Local Government Amici from denying such applications even where there might be legitimate grounds for such denials. That was not what Congress intended when it preserved local zoning authority over wireless facility siting.

Local Government Amici urge the Court to grant the petition for writ of certiorari and to reverse the decision below.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

Congress amended the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "TCA"). Congress enacted the TCA to "accelerate rapidly private sector deployment of advanced communications" by establishing "a pro-competitive, de-regulatory national policy framework." H.R. Conf. Rep. No. 104-458, at 113, *reprinted* in 1996 U.S.C.C.A.N. 124 (hereinafter "H.R. Conf. Rep."). At the same time, Congress expressly preserved state and local zoning authority over wireless telecommunications facilities siting, subject only to certain specified limitations. Section 704, Pub. L. No. 104-104, 110 Stat. at 151-52 (codified at 47 U.S.C. § 332(c)(7)).

Section 332(c)(7) is entitled "Preservation of local zoning authority" and provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The legislative history of the TCA leaves little doubt as to Congress's intent when it enacted

this section. Section 332(c)(7) "prevents [Federal Communications] Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth" in the TCA. H.R. Conf. Rep., at 208.

Thus, in the TCA, Congress allowed local governments to "retain the authority to regulate the siting of wireless telecommunications facilities" subject only to the "procedural and substantive limitations" specified in Section 332(c)(7). *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 829 (7th Cir. 2003). In so doing, Congress struck "a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities." *Id.*; see also *National Tower, LCC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 19 (1st Cir. 2002) (Section 332(c)(7) "is an exercise in cooperative federalism and represents a dramatic shift in the nature of telecommunications regulation").

In the TCA, Congress both defined the limits of local zoning authority and expressly created a remedy for wireless carriers claiming a violation of the limitations contained therein. Congress allowed any person "adversely affected" by a decision that is "inconsistent" with any of the requirements of Section 332(c)(7) to "commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v).

In Section 1983, Congress provided for a right of action and established remedies for persons deprived of any "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 1983 "came into existence as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 162 (1970). One of Congress's key objectives for enacting the Ku Klux Klan Act was "to override the

corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies in the Southern States." *Allen v. McCurry*, 449 U.S. 90, 98 (1980).

Congress subsequently expanded the rights of plaintiffs challenging deprivations of their civil rights under Section 1983 by enacting the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988). With respect to civil rights actions, Section 1988 changed the so-called "American Rule" that each party to a lawsuit must bear its own attorney's fees and authorized the courts to award attorney's fees to prevailing plaintiffs in such cases. *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986). Congress enacted Section 1988 "specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. . . . These victims ordinarily cannot afford to purchase legal services at the rates set by the private market." *Id.* at 576.

II. THE PROCEEDINGS BELOW

Respondent Mark Abrams filed a complaint under Section 332(c)(7) challenging the City's denial of his application for a conditional use permit to enable him to convert an existing wireless antenna on his property from amateur to commercial use. Pet. App. 16a-17a, 22a-23a. He sought monetary relief against the City under 42 U.S.C. § 1983 and recovery of his attorney's fees under 42 U.S.C. § 1988. Pet. App. 13a-15a, 17a.

The district court found that the City violated Section 332(c)(7)(B)(iii) because "substantial evidence" in the written record did not support the City's decision to deny Respondent's application for a conditional use permit. Pet. App. 16a-26a. The district court held that the City's

concerns about the antenna's visual impacts were insufficient grounds to deny Respondent's application for a conditional use permit because: (i) there were no further aesthetic impacts from Respondent's proposed commercial use of the existing antenna; and (ii) the decision was based entirely on generalized concerns about neighborhood aesthetics. Pet. App. 23a-24a. The court also held that the "actual reasons" for the denial, including a concern about a proliferation of antennas, were not sufficient grounds under the TCA. Pet. App. 24a.

The district court subsequently entered an order vacating the City's denial of Respondent's application for a conditional use permit and enjoined the City to grant Respondent a conditional use permit. Pet. App. 14a. The district court, however, rejected Respondent's claim for damages under Section 1983 and for attorney's fees under Section 1988. Pet. App. 15a. The district court held that the "remedies available" to Respondent "are subsumed under the TCA, and that damages are not available." Pet. App. 14a.

Respondent filed an appeal from the district court's determination that he did not have a remedy under Section 1983. In reversing the district court's decision, the Ninth Circuit held that the remedial scheme contained in the TCA is not sufficiently comprehensive to "close the door on § 1983 liability" because Section 332(c)(7) "contains no remedies at all." Pet. App. 7a-8a. The Ninth Circuit went on to find that the savings clause in the TCA "affirmed" Congress's intent to "refrain from foreclosing § 1983 remedies." Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for a writ of certiorari. The Ninth Circuit's decision that wireless carriers asserting a claim under Section 332(c)(7) can also recover

damages and attorney's fees under the civil rights laws expressly conflicts with decisions from the Third and Seventh Circuits. The Ninth Circuit's decision impliedly conflicts with decisions from other circuits in which the courts have granted wireless carriers injunctive relief and required local governments to issue the required permits when wireless carriers have prevailed in cases alleging violations of Section 332(c)(7). The Ninth Circuit's decision departs from this Court's precedents by ignoring numerous indicia that Congress intended Section 332(c)(7) as a comprehensive remedial scheme that is incompatible with allowing wireless carriers to sue under Section 1983 and recover attorney's fees under Section 1988.

Review is necessary at this time because the Ninth Circuit's erroneous decision will have widespread, deleterious impacts on local governments in states within the Ninth Circuit. Section 332(c)(7) has been a fertile ground for litigation since the TCA was enacted in 1996. Dozens of district courts have decided cases raising claims under Section 332(c)(7), and many circuit courts have heard appeals from those decisions. Meanwhile, wireless carriers continue to build their networks. In many communities, including San Francisco and Los Angeles, local residents continue to oppose the proliferation of wireless facilities.

Until the Ninth Circuit's decision, local governments in Ninth Circuit states, and indeed in most states, believed that the appropriate remedy for a violation of Section 332(c)(7) was to order the issuance of the permit required to allow the wireless carrier to construct its facility. The courts consistently allowed for such a remedy when wireless carriers prevailed in Section 332(c)(7) cases. In most of those cases, the wireless carriers did not even allege a Section 1983 claim because Section 332(c)(7) provided sufficient relief. Now, wireless carriers filing new cases in circuits other than the Third and Seventh Circuits are more likely to include Section 1983 claims in their

complaints. The courts will continue to grapple with this issue until this Court resolves the matter.

In the meantime, local governments in Ninth Circuit states, and possibly other states, would be required to pay wireless carriers sizeable damages and attorney's fees simply because a court determined that substantial evidence did not support a denial of an application to construct a wireless facility. Under the Ninth Circuit's decision, even a failure to issue a decision that meets the "in writing" requirement of Section 332(c)(7) would be considered a violation of a wireless carrier's civil rights under Section 1983 and result in a substantial monetary award.

The Ninth Circuit's erroneous decision thus casts an enormous pall over local regulation of wireless facilities siting in the communities represented by Local Government Amici and in any community in the Ninth Circuit. If allowed to stand, the decision could have a substantial detrimental effect on local decision-making by preventing local governments from continuing to enforce local zoning laws when wireless carriers file applications to construct wireless facilities. Once the permits are issued and the facilities are constructed there is no going back. Even when local elected officials appear to have legitimate grounds to deny certain permit applications, communities might have to accept additional wireless facilities because those officials feared exposing strapped budgets to awards of substantial damages and attorney's fees.

I. THE NINTH CIRCUIT'S HOLDING THAT A WIRELESS CARRIER HAS A REMEDY UNDER SECTION 1983 FOR A VIOLATION OF THE TCA CONFLICTS WITH THE HOLDINGS FROM OTHER CIRCUIT COURTS.

The analytical framework for deciding whether a federal law provides an individual plaintiff with a right to

relief under Section 1983 is well settled. There are two exceptions to the general rule that a plaintiff may seek redress under Section 1983 for violation of a federal law. First, a remedy under Section 1983 is available only if the Court finds that a law "created rights, privileges and immunities within the meaning of Section 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (internal quotations omitted). Second, no Section 1983 relief is available if the Court finds that Congress expressly forbade "recourse to § 1983 in the statute itself" or impliedly did so by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

While the courts have all relied on the same analytical framework to decide the question presented for review, a threefold conflict between the Ninth Circuit's decision and the Third and Seventh Circuits' decisions has developed. First, the Ninth Circuit held that even though Section 332(c)(7) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction" the "statute grants no remedies beyond procedural rights." Pet. App. 6a. The court held that the "procedural provisions are insufficient for us to conclude that the TCA contains a comprehensive remedial scheme that closes the door on § 1983 liability." Pet. App. 6a.

Faced with that very same question, the Third Circuit reached the opposite conclusion. *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 694-96 (3d Cir. 2002). The court held that the remedial scheme in the TCA is "comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* at 694. According to that court, the notable benefits include a right to "speedy redress." *Id.* at 695. The Seventh Circuit similarly held

that, "[a]ided by the presumption" that Congress intended a successful plaintiff in an action claiming a violation of Section 332(c)(7) to be entitled to the "usual remedies," the TCA's enforcement scheme is "complete." *Primeco Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1152-53 (7th Cir. 2003) (hereinafter *"Verizon Wireless"*) (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-76 (1992)).

Second, the Ninth Circuit held that the "TCA's provisions are compatible with § 1983's remedies." Pet. App. 9a. Focusing on the "procedural" nature of Section 332(c)(7), the court held that "Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time." Pet. App. 9a.

In *Nextel*, the Third Circuit had previously found that a Section 1983 remedy is incompatible with the TCA for two reasons. First, a plaintiff "would be freed of the short 30-day limitations period." 286 F.3d at 695. Such an expeditious review could limit the amount of damages that could be awarded. *Id.* Second, and "[p]erhaps most important, attorney's fees would be available." *Id.* The court noted the incongruity of allowing plaintiffs to obtain attorney's fees awards in cases that generally pit large corporations against small cities. *Id.* The Seventh Circuit similarly found that Congress could not have intended the TCA to provide the "unusual remedy" of attorney's fees to large "telecommunications enterprises." *Verizon Wireless*, 352 F.3d at 1152-53.

Finally, the Ninth Circuit held that the savings provision contained in Section 601(c)(1) of the TCA [47 U.S.C. § 152 (note)] "demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change.

Section 1983 clearly falls within the parameters of this general savings clause." Pet. App. 10a. In so doing, the Ninth Circuit wholly adopted the reasoning of the Eleventh Circuit in a decision that the Eleventh Circuit subsequently vacated. See *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1328 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001).

Again, the Third Circuit in *Nextel* reached the opposite result. 286 F.3d at 695-96. The court expressly disagreed with the Eleventh Circuit analysis that the Ninth Circuit subsequently adopted. *Id.* at 695. Instead, the court stated that its holding that the TCA did not create a right enforceable under Section 1983 "does not mean that the TCA in any way modified, impaired, or superceded [sic] § 1983." *Id.* at 696. Instead, it means only that the "TCA itself did not create a right that can be asserted under § 1983 in lieu of the TCA's own remedial scheme." *Id.*

There is an express conflict among the circuit courts that have decided the question presented for review. As noted in the petition, this conflict also reaches down to numerous cases decided in the district courts. Pet. 19-20. The Court should grant the petition to resolve this conflict.

The Court should also grant the petition to resolve the implicit conflict between the Ninth Circuit's decision and decisions from other circuit courts concerning the overarching question that is the foundation for the Ninth Circuit's decision: Whether a prevailing plaintiff in a Section 332(c)(7) action has any *remedies* against the defendant. Pet. App. 6a, 9a. Every other circuit court in which a wireless carrier prevailed on appeal in a Section 332(c)(7) claim has answered this question in the affirmative,

holding that, at a minimum, injunctive relief is available for a violation of Section 332(c)(7).

In *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), for example, the court upheld an appeal from the district court's determination that the defendant had violated Section 332(c)(7). *Id.* at 497. The town had argued on appeal that the district court improperly issued an injunction ordering the town to issue the necessary permits and that the court should have remanded the application back to the town "for compliance with remaining local procedure." *Id.*

The Second Circuit affirmed the district court's injunction. The court held that "injunctive relief best serves the TCA's stated goal of expediting resolution of this type of action." *Id.* See also *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *New Par v. City of Saginaw*, 301 F.3d 390, 399-401 (6th Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002).

The holdings in these cases are consistent with the legislative history of the TCA in which Congress noted that the TCA "provides a mechanism for judicial relief from zoning decisions that fail to comply with" Section 332(c)(7). H.R. Conf. Rep., at 208. The Ninth Circuit's determination that wireless carriers do not have any remedies under Section 332(c)(7), on the other hand, is inconsistent with the legislative history of the TCA.

Unless this Court grants the petition and resolves these conflicts among the circuit courts, local governments in Ninth Circuit states will be forced to refrain from exercising their local zoning authority in order to avoid damages and attorney's fees awards that they can't afford to pay. Local governments in states in the Third and Seventh Circuits, however, can continue to consider applications to construct wireless facilities without such

fears. Meanwhile, local governments in states in the other circuits are left wondering whether their actions could be costly while cases considering this issue work their way through the courts.

II. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S ESTABLISHED PRECEDENTS BECAUSE IT IGNORES NUMEROUS INDICIA THAT THE REMEDIAL SCHEME CONGRESS CREATED IN THE TCA IS COMPREHENSIVE AND INCOMPATIBLE WITH ENFORCEMENT UNDER SECTION 1983.

In deciding whether a remedial scheme is sufficiently comprehensive and incompatible with Section 1983, a court should look to the statutory language, the legislative history, and "other traditional aids of statutory interpretation." *Sea Clammers*, 453 U.S. at 13. When Congress enacted Section 332(c)(7), it legislated against a historical backdrop that leads to the inescapable conclusion that Congress created a comprehensive legislative scheme that is incompatible with enforcement under Section 1983.

First and foremost, the Ninth Circuit's decision that wireless carriers have a remedy under Section 1983 for violation of Section 332(c)(7), and a concomitant right to attorney's fees under Section 1988, ignores the purposes of the TCA and the civil rights statutes.

For more than a century, private parties have challenged zoning ordinances and individual zoning decisions in court. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (noting that zoning laws began around the turn of the century). Thus, in Section 332(c)(7) Congress authorized the courts to hear *appeals* from zoning decisions by local governments. See H.R. Conf. Rep., at 209 (a party "appeals" a decision under Section 332(c)(7)).

A court could find that a local zoning authority violated Section 332(c)(7) simply because: (i) its decision to deny an application for a permit to construct a wireless facility was not "in writing;" or (ii) substantial evidence did not support its determination that the aesthetics of a particular wireless facility were incompatible with local zoning codes. See, e.g., *Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966, 973 (E.D. Va. 1998) (to be "in writing" a decision must set out the reasons for the decision and the evidence that led to it); *Sprint Spectrum L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 253 (D. Conn. 1998) (disagreeing with local government's determination that the proposed wireless facility would not be "in harmony" with the surrounding environment). These are not the types of abuses of local authority that Congress intended to vindicate when it enacted Sections 1983 and 1988. The Ninth Circuit's decision trivializes the importance of those laws.

Further, the remedies typically available to a person successfully challenging a zoning decision did not include damages and attorney's fees. Zoning decisions are subject to judicial review in all fifty states. Kenneth H. Young, Anderson's American Law of Zoning § 27.01 (4th ed. 1996). In some states review is had by way of appeal, while other states authorize either a proceeding in the nature of certiorari or an action for a writ of mandamus. *Id.* Indeed, in many states, local governments and local government officials are immune from liability for damages resulting from successful challenges to zoning decisions. See, e.g., Cal. Gov. Code §§ 818.4, 821.2; 745 Ill. Comp. Stat. §§ 2-104, 2-206; Ohio Rev. Code § 2744.03.

When it enacted the TCA, Congress certainly had to be aware of how the states have historically allowed for judicial review of local zoning decisions. Congress included a savings clause in the TCA so as not to impair such state laws. Rather than ensuring equal treatment for wireless

carriers when they file zoning applications for the construction of wireless facilities, as Congress intended, the Ninth Circuit's decision gives wireless carriers a decided advantage over other persons or entities seeking zoning approval for their projects.

Second, Section 332(c)(7) is a unique statute in that only a small number of persons or entities could become plaintiffs and seek remedies under the statute. To be a plaintiff in such a case, a person must have filed an application with a state or local government for a permit to construct a "personal wireless service" facility. See 47 U.S.C. § 332(c)(7)(A). Congress must have known that the plaintiffs in these cases would for the most part be multi-million dollar telecommunications corporations with ample resources to challenge any claimed violation of the law. As Judge Posner wrote: "The Telecommunications Act, in contrast to the federal civil rights statutes, creates rights in telecommunications enterprises, which are usually substantial corporations, such as Verizon. They have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes." *Verizon Wireless*, 352 F.3d at 1152.

Moreover, only states and local governments could be defendants in actions brought under Section 332(c)(7). The Ninth Circuit's finding that Congress did not intend Section 332(c)(7) to preclude a claim under Section 1983 defeats the "delicate balance" Congress struck in Section 332(c)(7) between the competing interests of wireless carriers and state and local governments with respect to wireless facility siting. The decision tips the scales in favor of wireless carriers. The small cities and towns with stringent zoning requirements that often are defendants in these cases would not want to run the risk of being required to pay an award of damages and attorney's fees.

Third, Section 332(c)(7) is preemptive. See *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 16 (1st Cir. 1999) (Section 332(c)(7) preempts state and local laws "if they are read and applied so as effectively to preclude personal wireless service"). Such preemptive language is a strong indication that Congress intended the TCA's comprehensive scheme to be incompatible with a remedy under Section 1983. It is well settled that preemption of state and local law under the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) "does not create rights enforceable under § 1983." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). Instead, the Supremacy Clause "secures federal rights by according them priority whenever they come in conflict with state law." *Id.* (internal quotation marks omitted).

Finally, prior to the enactment of the TCA, it had been widely held that the Communications Act did not create any rights enforceable under Section 1983. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (the Communications Act "is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication"); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) (the Communications Act "did not create new private rights"); *DeYoung v. Patten*, 898 F.2d 628, 634 (8th Cir. 1990) (no Section 1983 action is available under the Communications Act where there is a sufficient FCC enforcement remedy available). It has to be assumed that Congress is "unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999). Thus, consistent with established law, in providing for a judicial remedy under Section 332(c)(7) Congress demonstrated its intent to require wireless carriers to challenge wireless facilities siting decisions solely under Section 332(c)(7),

without seeking additional relief under Section 1983 and attorney's fees under Section 1988.

III. LITIGATION UNDER SECTION 332(C)(7) IS PROLIFERATING AND THE THREAT OF DAMAGES AND ATTORNEY'S FEES IS IMPAIRING THE ABILITY OF LOCAL GOVERNMENTS TO ENFORCE THEIR LOCAL ZONING CODES.

The issue in this case is a recurring one and the Ninth Circuit's decision threatens dire consequences for towns, cities and counties throughout the nation. In Section 332(c)(7), Congress expressly preserved local zoning authority over wireless facilities siting. The Ninth Circuit's determination that wireless carriers can sue local governments under Section 1983 for violation of the TCA, and recover attorney's fees under Section 1988, will impair the ability of local governments to enforce local zoning codes in a manner consistent with the requirements of Section 332(c)(7).

Despite a landscape dotted with wireless antennas, the need for new antennas appears to be unabated. Customers continue to demand better service.[2] Responding to those demands, wireless carriers continue to build out their networks to increase capacity, expand their coverage areas, and provide enhanced services.[3]

In the first quarter of 2004, Verizon Wireless invested over $1 billion to construct new wireless facilities, grow its

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[2] Ellen Simon, *Complaints Over Cell Phone Service Abound*, Associated Press, June 4, 2004 (among the complaints are "frequently dropped calls").

[3] *Id.* (wireless companies "insist" that "they're investing in their networks").

capacity, and engineer other improvements.[4] Sprint Corp. and Cingular Wireless recently announced plans to further upgrade their networks.[5] New wireless carriers continue to enter the market.[6] These new carriers must construct numerous facilities in order to compete. Even in San Francisco, where wireless carriers have constructed more than 2,400 antennas, they continue to file applications for additional permits for new facilities.[7] Community opposition to those applications continues.[8] Indeed, on June 29, 2004, the San Francisco Board of Supervisors denied Cingular Wireless's application for a conditional use permit to construct a new wireless facility in the face of strong opposition from the community.

There also appears to be no let-up in the lawsuits that wireless carriers are filing against local governments when their applications for permits are denied. Emboldened by the Ninth Circuit's decision, wireless carriers may be even more willing to take cash-strapped cities to court to challenge zoning decisions that don't go their way. Sprint recently threatened to sue the city of Berkeley, California, if the city denied Sprint's application to construct a wireless antenna.[9] Sprint has also recently sued Stamford, Connecticut, and La Mesa, California.[10]

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[4] *Thinking of Switching Wireless Providers? Verizon Wireless has Nation's Most Reliable Network*, PR Newswire, May 19, 2004.

[5] *Sprint, Cingular, Unveil Upgrade Plans*, TRDaily, June 22, 2004.

[6] Todd Wallack, *New Entry in Wireless Race*, San Francisco Chronicle, September 19, 2002.

[7] Carol Lloyd, *Calling All Cell-Phone Antennas*, www.SFGate.Com (June 9, 2004).

[8] *Id.*

[9] Emily Motsay, *Operators Scoring in Court on Rejected Towers Apps*, RCR Wireless News, May 10, 2004.

[10] *Id.*

On June 24, 2004, Verizon Wireless filed a lawsuit against San Francisco in the Northern District of California challenging a denial of an application for a conditional use permit to construct a wireless facility.[11] The City is already defending three other such suits.[12]

Many cities in California and other states must close huge budget deficits.[13] Fighting these claims could lead to ruinous damages and fee awards. For example, the City of Carlsbad, California, recently agreed to pay AT&T Wireless $250,000 in attorney's fees to settle a wireless siting dispute after AT&T Wireless had asked for $640,000.[14] The district court had previously ruled that Carlsbad's decision to deny AT&T Wireless a conditional use permit to construct a wireless facility was not based on substantial evidence. *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148 (S.D. Cal. 2003). Carlsbad has a population of about 90,000 and a budget of about $150 million.[15] In a city of that size a judgment of $640,000 could be devastating.

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[11] *GTE Mobilnet of California, L.P. v. City and County of San Francisco*, C-04-2534 SI.

[12] *MetroPCS, Inc. v. City and County of San Francisco*, C-02-3442 PJH and C-03-0617 PJH; *Bay Area Cellular Tel. Co. v. City and County of San Francisco*, C-03-4866 PJH. These cases were also filed in the Northern District of California.

[13] Rachel Gordon, *$5 Billion City Budget Full of 'Sacrifices,'* San Francisco Chronicle, June 2, 2004.

[14] Elena Gaona, *Carlsbad Settles Suit Over Cell-phone Tower*, San Diego Union-Tribune, May 7, 2004. The city also expended a substantial amount of money just to defend the lawsuit. See Barbara Henry, *Carlsbad, Calif., Spends $146,000 on Lawsuit Over AT&T Cell Phone Tower*, North County Times, September 20, 2003.

[15] *See generally* http://ci.carlsbad.ca.us.

Rather than preserving local zoning authority, as Congress intended, the Ninth Circuit's decision will prevent local governments from enforcing zoning code requirements related to the construction of wireless facilities. Zoning decisions often entail a balancing of competing interests. Making decisions that are consistent with federal and local laws, while balancing those interests, is especially problematic for small cities and towns. They have neither the resources nor the expertise to defend against the lawsuits that are certain to be filed against them by wireless carriers, let alone to pay the damages and attorney's fees that wireless carriers would be entitled to if they prevailed. Faced with this substantial risk, it is reasonable to assume that local governments will simply opt to grant applications for permits to construct wireless facilities.

CONCLUSION

Local Government Amici urge the Court to grant the petition for a writ of certiorari.

Dated: July 1, 2004

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et. al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The National League of Cities, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the National Association of Counties, and the United States Conference of Mayors submit this brief as amici curiae supporting Petitioners, the City of Rancho Palos Verdes, California and its City Council.[1]

INTEREST OF AMICI CURIAE

The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

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[1] Pursuant to this Court's Rule 37.2, letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interests of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3,034 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The amici have a strong interest in this case. The Ninth Circuit's decision places a substantial financial burden on local governments. As this Court has observed, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act") is "not a model of clarity." *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). As a result, local governments – including many smaller governments with limited resources – may attempt in good faith to follow the requirements of the 1996 Act and yet still run afoul of its demands. Under the Ninth Circuit's decision in this case, these governments will be required to pay prevailing plaintiffs damages under 42 U.S.C. § 1983 and attorneys' fees under 42 U.S.C. § 1988. Because such awards are often substantial, local governments operating with limited resources may conclude that they cannot afford to exercise control over the placement and construction of wireless facilities, despite Congress's determination that local governments

should retain authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

The effects of the decision in this case are likely to be felt well beyond the borders of the Ninth Circuit. Although the Third and Seventh Circuits have found §§ 1983 and 1988 to be unavailable in suits brought under § 332(c)(7)(B), *see Primeco Personal Communications, Limited Partnership v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003); *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir. 2002), local governments in other circuits will be leery about exercising their congressionally-protected authority to make decisions regarding the placement of wireless facilities. Many local governments outside the Ninth Circuit may provide less protection to community interests in safety and aesthetics in order to avoid the risk of having to pay out hundreds of thousands of dollars in damages and attorneys' fees.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City's Petition for Certiorari presents an important issue of law that merits this Court's review. The question presented involves the proper application of two important federal statutes. The law is now in a state of confusion as a result of the contradictory opinions of the Third, Seventh, and Ninth Circuits. The Ninth Circuit's decision is incorrect because it ignores both the congressional preservation of authority over the placement of wireless facilities and the comprehensive remedial scheme for redressing violations. If allowed to stand, the decision will have a substantial detrimental affect on local decision-making, contrary to the intent of Congress.

Congress enacted the 1996 Act to create a "policy framework designed to accelerate rapidly private sector

deployment of advanced communications." H.R. Conf. Rep. No. 104-458, at 113, *reprinted* in 1996 U.S.C.C.A.N. 124. At the same time, Congress recognized the need to preserve state and local zoning authority over the siting of wireless telecommunications facilities. Congress recognized that at the most basic level any decision regarding the siting of wireless telecommunications facilities is a land use decision and enacted legislation accordingly.

Specifically, Congress enacted § 332(c)(7) which is titled "Preservation of local zoning authority." This section states in part:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

47 U.S.C. § 332(c)(7)(A). Congress limited this authority by providing that local governments may not discriminate unreasonably between providers of services, and may not prohibit the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i). In addition, local governments are required to act on requests in a reasonable period of time, to document denials in writing, and support them with substantial evidence in the record. 47 U.S.C. § 332(c)(7)(B)(ii) and (iii).

Congress further provided that

> [a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. § 332(c)(7)(B)(v).

By enacting § 332(c)(7), Congress reiterated and protected local government's long-standing zoning authority, while imposing affirmative obligations on local government to ensure telecommunications deployment. Congress also provided a specific and unique mechanism through which persons alleging a violation of these provisions of the 1996 Act could seek redress in a federal or state court. Congress recognized that decisions regarding the placement, construction, and modification of wireless facilities are made in the context of land use decisions. Congress was also aware of the ordinary manner in which land use decisions are litigated and provided for a different method of litigation, a method which is contrary to the body of law developed under § 1983.

ARGUMENT

I. THE CONFLICT IN THE CIRCUITS REQUIRES RESOLUTION BY THIS COURT

The Ninth Circuit's decision in this case conflicts with decisions of the Third and Seventh Circuits. *See Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir. 2002); *Primeco Personal Communications, Limited Partnership v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003). (A panel of the Eleventh Circuit followed reasoning similar to the Ninth Circuit, but its decision was vacated and the case was dismissed. *See AT&T Wireless PCS, Inc., v. City of Atlanta*, 210 F.3d 1322 (11th

Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *dismissed on settlement*, 264 F.3d 1314 (2001)). As a result of these decisions, local governments in some states are protected from claims for § 1983 damages and attorneys' fees for violations of the 1996 Act, while in other states local governments are exposed to such claims. The conflicting decisions of the courts of appeals have created considerable uncertainty throughout the rest of the country.[2]

The Third Circuit held that § 1983 is not available to enforce rights under the 1996 Act because that Act "provides private judicial remedies that incorporate notable benefits and corresponding limitations." *Nextel*, 286 F.3d at 694. The Third Circuit concluded that superimposing §§ 1983 and 1988 on top of this scheme would upset the balance established by Congress in the 1996 Act. *Nextel*, 286 F.3d at 694.

Similarly, the Seventh Circuit held § 1983 remedies are not available to enforce the Telecommunications Act. *Primeco*, 352 F.3d at 1152. The Seventh Circuit noted that the purpose of § 1988 is to shore up the ability of those with meager resources to vindicate their rights. Judge Posner's opinion for the court concluded that the 1996 Act benefits telecommunications enterprises, "substantial corporations" which "have the wherewithal to finance their own litigation." *Id.* at 1152. Although the Seventh Circuit viewed the 1996 Act as silent on the issue of remedies (and thus distinguishable from the remedial scheme described in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981)), the court reasoned that the 1996 Act confers the right to sue and this right "is presumed to entitle a successful plaintiff to the usual remedies." Therefore, the court held, § 1983 should not be "fastened, barnacle-like" to the 1996 Act. *Primeco*, 352 F.3d at 1152-53.

The Ninth Circuit rejected the Third Circuit's conclusion that the 1996 Act embodies any remedial scheme, let alone a comprehensive scheme. Pet. App. 7a-8a. There is thus a direct conflict in the circuits that can be resolved only by a decision of this Court. The issue has now been thoroughly analyzed in decisions of multiple courts of appeals. The unequal treatment of local governments (and plaintiffs) in different circuits, as well as the substantial uncertainty generated by the conflicting decisions of the lower federal courts, weigh in favor of prompt review by this Court.

II. THE NINTH CIRCUIT'S DECISION IS INCORRECT

Under this Court's precedent, the Ninth Circuit's decision cannot stand. It is undisputed that the 1996 Act: (i) provides plaintiffs with a right to file suit within 30 days of an alleged violation in any court, 47 U.S.C. § 332(c)(7)(B)(v); (ii) further provides that decisions of local governments will be reviewed under a "substantial evidence" standard, 47 U.S.C. § 332(c)(7)(B)(ii); and (iii) requires a prompt judicial decision, 47 U.S.C. § 332(c)(7)(B)(iii). These specific requirements, coupled with the presumption that a right to sue carries with it the appropriate remedies, are "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20.

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[2] As the City's petition explains (Pet. 26), local governments that deny applications to erect antenna towers frequently find that they become defendants in actions brought by the disappointed applicant in federal court under § 332(c)(7) of the 1996 Act. Federal district courts have also divided on the availability of § 1983 damages and § 1988 fees in such cases, adding to the confusion in this area. *See* Pet. 19-20.

The provision of a specific federal review mechanism under § 332 counsels against the availability of § 1983 as an additional means to vindicate violations of the 1996 Act. In *Gonzaga University v. Doe,* 536 U.S. 273 (2002), this Court found that the Family Educational Rights and Privacy Act (FERPA) did not create any private rights enforceable through § 1983. In reaching that conclusion, this Court distinguished prior cases in which it had upheld the availability of redress under § 1983, noting that in those cases aggrieved parties "lacked any federal review mechanism." *Id.* at 290, citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990).

Here, Congress expressly created a mechanism for obtaining federal judicial review of zoning decisions regarding wireless facilities, including expedited judicial review of such decisions. 47 U.S.C. § 332(c)(7)(B)(v). Not only is this a comprehensive remedy, but it is significantly different from the usual manner of challenging land use decisions under § 1983. In the normal course of § 1983 land use litigation, plaintiffs are not required to file suit within 30 days and are not entitled to expedited resolution of their cases. Indeed, apart from § 332(c), land use disputes with local governments typically must be litigated in state court in the first instance. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) ("A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."); *Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989) (to succeed on substantive due process claims, plaintiff must show inadequacy of state law remedies).

The legislative history confirms that Congress intended to preserve the authority of State and local governments over zoning and land use matters except in

limited circumstances, and to prevent the Federal Communications Commission from preempting local and State land use decisions. *See* H.R. Conf. Rep. No. 104-458, at 207-8 (1996). The Conference Report notes that challenges under § 332(c)(7) are not subject to the restrictions imposed by long-standing § 1983 land use law such as exhaustion of state law remedies and the concurrent inability to proceed in federal court. The text of the Conference Report could not be more specific:

> The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) *may be the Federal district court* in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that *a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.*

H.R. Conf. Rep. No. 104-458, at 209 (1996) (emphasis added). Thus, § 332(c)(7) not only provides a comprehensive remedial scheme, it also departs from the current state of the law in the application of § 1983 in land use cases by allowing immediate and expedited review in federal court.

The language Congress employed coupled with the legislative history show that Congress did not intend plaintiffs seeking redress of alleged § 332(c)(7) violations to have to resort to the normal avenues of relief available in land use cases. Congress was well aware of the normal mechanisms for litigating land use disputes under § 1983

and altered this litigation landscape when it enacted § 332(c)(7). This is supported by the numerous bills that were pending in Congress at the time the 1996 Act was drafted and enacted that sought to change the manner in which land use disputes are litigated. *See, e.g., The Private Property Protection Act*, H.R. 925; *Omnibus Property Rights Act of 1995*, S.B. 605; 104th Cong., 1st Sess. (1995). For most of the latter portion of the 1990s Congress had before it one or more bills which sought to accomplish for all of land use law what it had accomplished for § 332(c)(7) of the Telecommunications Act. *See, e.g., Private Property Rights Act of 1997* S.B. 709; *Citizens Access to Justice Act of 1997*, S.B. 1256; *Property Owner's Access to Justice Act*, S.B. 1204; *Private Property Rights Implementation Act of 1997*, S.B. 1534, 105th Cong. (1997).

The stated purposes of these bills were to simplify and expedite access to federal courts for those alleging interference with their property rights, to clarify when government action was sufficiently final to "ripen" claims under the Constitution, and to eliminate exhaustion requirements. *See* Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 Stan. Envtl L.J. 3, 27-35 (2004). Ultimately, none of these bills was successful because of grave concerns about whether Congress had the authority to effect such a change in the constitutional requirements for litigating land use disputes. The legislative history of § 332(c)(7) shows that Congress fully intended to implement this change in litigation confined to the siting of wireless facilities.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT ADVERSE EFFECT ON LOCAL GOVERNMENT ENFORCEMENT OF ZONING LAWS

The 1996 Act and judicial decisions interpreting the 1996 Act affect local governments throughout the United States. The 1996 Act makes tower siting disputes subject to a litany of federal requirements that readily lend themselves to litigation, including requirements that the local government may not "unreasonably discriminate" among service providers, may not "prohibit or have the effect of prohibiting the provision of personal wireless services," must issue decisions within "a reasonable period of time" and based on "substantial evidence," and may not consider "the environmental effects of radio frequency omissions." *See* Pet. 27 (internal quotations and citations omitted).

The United States is comprised of 3,034 counties, 19,431 municipalities and 16,506 townships. See THE MUNICIPAL YEAR BOOK 2004, International City/County Management Association xi (2004) (citing U.S. Census data for 2002). Thus, nearly 40,000 local governments are potentially affected by the application of §§ 1983 and 1988 to suits arising under the 1996 Act. The vast majority of these jurisdictions have less than 50,000 inhabitants. *Id.* at xii-xiii. Many do not have full-time counsel. These jurisdictions face a serious, and potentially disastrous, financial burden if they are required to pay damages and attorneys' fees for inadvertent violations of a specialized federal statute.

A recent survey of attorneys' fee calculations in 16 federal civil rights cases in California covering the years 2000 and 2001 found that federal courts awarded attorneys' fees with an average billable rate of $253.44, and an average amount awarded of over $150,000. Michael Koa, *Calculating Lawyers Fees: Theory and*

Reality, 51 U.C.L.A. L. Rev. 825, 841 (2004). The author also reviewed thirteen California state court civil rights cases awarding attorneys' fees, finding an average billable rate of $234.33 per hour, and an average award of more than $65,000. *Id.* at 841. These amounts are "substantially above the fee caps in cases against the federal government under the Equal Access to Justice Act (maximum hourly rate of $125), and also well above the amount awarded to appointed counsel in federal criminal cases (maximum hourly rate of $75)." *Id.* at 845.

Attorneys' fees in civil rights cases often exceed the actual monetary damages awarded to plaintiffs. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 907-08 (9th Cir. 2002) (affirming an award "more than five times the amount of the compensatory and punitive damage awards combined"); *Cowan v. Prudential Ins. Co.*, 935 F.2d 522, 526 (2d Cir. 1991) (lodestar "should not be reduced simply because a plaintiff recovered a low damage award"). The flexible "reasonableness" standard of § 1988 permits a court to award legal fees that substantially exceed the damages. Indeed, this Court upheld an attorney's fee award of $245,456 in a case where the plaintiff only recovered $33,350 in compensatory and punitive damages. *City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986). The size of these awards can create havoc with local government budgets.

To place attorney fee awards in context, in 2002, police and sheriff's patrol officers had median annual earnings of $42,270, while median hourly earnings of firefighters were $17.42 in 2002 (assuming a 40 hour work week, this amounts to a yearly salary of approximately $36,000). *See Occupational Outlook Handbook*, Bureau of Labor Statistics, Department of Labor, available at http://stats.bls.gov/oco/ocos160.htm and http://stats.bls.gov/oco/ocos158.htm.

Fear of these awards would certainly lead to a chilling effect with respect to wireless siting issues. More than three police officer, or four firefighter, positions could be eliminated as a result of an attorney fee award of $150,000. These chilling effects are widely recognized. In a 2002 article in the Pittsburgh Tribune-Review constitutional law Professor Arthur Hellman stated that, because of the threat of attorney's fees, "[t]here will still be strong incentives (for defendants) to settle cases," and "[o]fficials are going to think twice" about pursuing cases to trial. *See* Joseph D. Wilcox, *Legal Fees Can Add Up In Civil Rights Cases*, Pittsburgh Tribune-Review, Dec. 2, 2002, available at http://www.pittsburghlive.com/x/search/s_105525.html.

The chilling effect on local government zoning authority as a consequence of applying § 1983 for violations of the 1996 Act is significant. The Ninth Circuit's decision subjects local governments to the threat of substantial monetary liability if they deny applications to erect cellular antenna towers. Because disappointed applicants can file suit in federal court with relative ease, the Ninth Circuit's decision will require local governments to adjust their planning and zoning efforts in order to conserve their limited financial resources. Many local governments will decide that visual, aesthetic and safety concerns are "not worth fighting for" in light of the possibility of having to pay their opponents' legal fees. The Ninth Circuit's decision thus undermines the intent of Congress to leave authority for local zoning decisions in the hands of local governments, and compromises the ability of local governments to protect their citizens.

The Third and Seventh Circuits recognized that allowing well-funded and sophisticated telecommunications providers to recover their litigation costs from local communities subverts the purpose of §§ 1983 and 1988. *See Primeco*, 352 F.3d at 1152; *Nextel*, 286 F.3d at 695. Many local governments are small and

unsophisticated, with minimal financial resources. The attorneys' fees awarded under §§ 1983 and 1988 would come from revenues which these local governments should be spending on basic services including police and fire protection, infrastructure, and general services. Congress did not intend to provide wireless service providers with the ability to seek attorneys' fees any time a local government improperly denies a permit to construct wireless facilities.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.*, expressly preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," such as antenna towers used to provide cellular telephone service. 47 U.S.C. § 332(c)(7)(A). The Act also establishes limits on that state and local authority, requiring (among other things) that state and local decisions regulating the placement and construction of wireless service facilities not unreasonably discriminate among providers of functionally equivalent services, and not have the effect of preventing the provision of wireless telephone service. 47 U.S.C. § 332(c)(7)(B)(i). The Act requires that state and local decisions denying requests be in writing and be supported by substantial evidence. 47 U.S.C. § 332(c)(7)(B)(iii). Finally, the Act provides an express cause of action through which "[a]ny person adversely affected" by a decision alleged to violate those limits may seek judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The question presented is:

Whether the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners the City of Rancho Palos Verdes (a municipality) and the City of Rancho Palos Verdes City Council were defendants-appellees in the court of appeals. Respondent Mark J. Abrams was the plaintiff-appellant in the court of appeals. Frank Lyon, John Cartwright, Thomas Long, Craig Mueller, Theodore Paulson, Donald Vannorsdall, John McTaggart, Douglas W. Stern, Lee Byrd, Barbara Ferraro, Marilyn Lyon, and Larry Clark (individual members of the City Council and the City Planning Commission) were defendants in district court.

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IN THE

Supreme Court of the United States

No. 03-1601

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 354 F.3d 1094. The order and opinions of the district court (Pet. App. 13a-15a, 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. A petition for rehearing was denied on March 16, 2004 (Pet. App. 65a). A petition for a writ of certiorari was filed on May 25, 2004. The petition was granted on September 28, 2004. 125 S. Ct. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act, 47 U.S.C. § 151 *et seq.*, and of 42 U.S.C. §§ 1983 and 1988, are

set forth in the Appendix to the Petition for a Writ of Certiorari, Pet. App. 66a-79a, and are reproduced as an Appendix to this Brief, App., *infra*, 1a-14a.

STATEMENT

This case concerns the effect of 47 U.S.C. § 332(c)(7), a Communications Act provision entitled "Preservation of local zoning authority." The question is whether Section 332(c)(7) subjects local governments to liability for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988 for ordinary land-use decisions found to violate the Communications Act. The Third and Seventh Circuits have answered that question in the negative, holding that the expedited judicial review provided by the Communications Act itself, in 47 U.S.C. § 332(c)(7)(B)(v), furnishes the appropriate remedy. In the decision below, the Ninth Circuit reached the opposite result, following a vacated decision of the Eleventh Circuit.

1. The Communications Act of 1934 ("Communications Act" or "Act"), 47 U.S.C. § 151 *et seq.*, "established a comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942). In 1996, Congress amended the Act "to secure lower prices and higher quality services for * * * consumers" by "promot[ing] competition," "reduc[ing] regulation," and "encourag[ing] the rapid deployment of telecommunications technologies." Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. Of particular relevance here, the 1996 Act added 47 U.S.C. § 332(c)(7) to address the relationship between local land-use policies and the siting, construction, and modification of antenna towers used to provide cellular and other wireless telephone services. 1996 Act, § 704, 110 Stat. at 151-152.

As initially drafted, Section 332(c)(7) "would have allowed the FCC total federal preemption of state authority to regulate tower siting." *Sprint Spectrum L.P.* v. *City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2004). Congress, however, "rejected this approach," enacting Section 332(c)(7) to establish a balance that "leaves zoning authority in the hands of state and local governments," subject to specified limits. *Ibid.*; see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996) (Section 332(c)(7) "prevents [FCC] preemption * * * and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth.").

Entitled "Preservation of local zoning authority," Section 332(c)(7) states in part:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

47 U.S.C. § 332(c)(7)(A).

The next paragraph, 47 U.S.C. § 332(c)(7)(B), establishes certain limits on that authority. First, it provides that state and local "regulation of the placement, construction, and modification of personal wireless service facilities" may not "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). Second, it declares that such regulation may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Finally, the Act bars regulation based on the "environmental effects of radio frequency emissions" if the facilities otherwise comply with FCC rules. 47 U.S.C. § 332(c)(7)(B)(iv). Within those limits, however, States and municipalities retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently." H.R. Conf. Rep. No. 458, *supra*, at 208. Thus, even "if a State or local government grants a permit in a commercial district," there

is no requirement that it "also grant a permit for a competitor's 50-foot tower in a residential district." *Ibid.*

Section 332(c)(7) incorporates traditional local administrative review followed by a right to federal judicial review. It requires state and local authorities to act on requests to "place, construct, or modify" wireless service facilities "within a reasonable period of time * * * taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii). Any decision denying a request must "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The Conference Report explains that the "substantial evidence" test is "the traditional standard used for judicial review of agency actions," and that a "reasonable period of time" means "the usual period" for zoning decisions under similar circumstances. H.R. Conf. Rep. No. 458, *supra*, at 208. "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." *Ibid.*

Finally, to enforce those requirements, the Act provides an express federal cause of action:

> Any person adversely affected by any final action or failure to act by a State or local government * * * that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) provides a "mechanism for judicial relief from zoning decisions that fail to comply with" the limits of Section 332(c)(7)(B). H.R. Conf. Rep. No. 458, *supra*, at 208. The "court to which a party appeals a decision may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal." *Id.* at 209.

Persons adversely affected by improper consideration of the "environmental effects of radio frequency emissions" in violation of Section 332(c)(7)(B)(iv) have an additional option: They may bring the cause of action for judicial review described above, or they may "petition the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v). The FCC handles such requests as petitions for declaratory judgments. *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 15 F.C.C.R. 22,821, 22,822-22,823, 22,826, ¶¶ 1, 4, 10 (2000).

2. This is the second lawsuit between respondent Mark J. Abrams and the City of Rancho Palos Verdes, California ("the City"), in connection with respondent's construction and commercial use of antenna towers in the yard of his single-family residence.[1] Respondent holds numerous FCC licenses and provides radio communication services for profit, individually and as a principal in a company called Mobile Relay Associates; he is also a licensed amateur (or "ham") radio operator. Pet. App. 2a; Certified Administrative Record ("Admin. Rec.") 434, 863. Respondent resided in the City's Del Cerro neighborhood. His property and the surrounding neighborhood are zoned for detached, single-family residences in a low-density environment.

a. Between 1989 and 1990, respondent applied for and received permission from the City's Planning Department to erect a radio antenna in the yard of his residence, solely

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[1] The City of Rancho Palos Verdes, population 41,000, is located on the scenic Palos Verdes peninsula, about 23 miles from downtown Los Angeles. The Del Cerro neighborhood is near the top of a ridge about two miles from the coast, providing panoramic views of canyons, the ocean, and offshore islands from one side, and of the L.A. basin, city lights, and the San Gabriel Mountains from the other.

for amateur use. The application proposed a 30-foot antenna structure with a 10-foot retractable mast that would "extend to 40 [feet] and nest at 30 feet." Admin. Rec. 2; see *id.* at 14; Pet. App. 23a. The City's Municipal Code barred the construction of any antenna taller than 40 feet absent a minor exception permit, which respondent did not seek. See Rancho Palos Verdes Mun. Code § 17.04.050(B)(4), (8); Admin. Rec. 335. The permit approving the structure specified that the "maximum height of the structure shall not exceed 40.0 feet from grade to top of mast when in use" and that, "when not in use, [the] structure shall be lowered to 30[-foot] nesting height." Admin. Rec. 862, 921. The permit expressly prohibited commercial use. *Ibid.*

After receiving that permit, respondent submitted construction plans that described the "project" as a "30 foot * * * tower," but depicted an antenna structure with a fixed height of 52.5 feet. Admin. Rec. 50-51. Apparently unaware that the Planning Department had specified a maximum height of 40 feet and a nesting height of 30 feet, the building inspector stamped the plans as approved, *id.* at 50, and respondent erected a 52.5-foot tower. See Pet. App. 54a.[2] Notwithstanding the permit's prohibition on commercial use of the antenna structure, respondent used it to provide commercial services. *Id.* at 2a, 34a-35a. In addition, respondent, his company, and others, acquired more than 70 FCC licenses to operate on commercial frequencies from respondent's residence. Admin. Rec. 909-916.

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[2] The inspector's stamp stated that the "stamping of these plans and specifications SHALL NOT be held to permit or be an approval of the violation of any provisions of any City Ordinance or State Law." Admin. Rec. 50, 620. Consequently, there was a dispute as to whether the inspector's final approval rendered the tower lawful despite the Municipal Code's prohibition on towers taller than 40 feet absent a special use permit. See, *e.g.*, *id.* at 169-170, 307-308, 312-313, 332.

While the City was investigating suspected commercial uses of that antenna tower, respondent erected another, this time on a trailer in his yard, and extended it to a height of more than 100 feet. Admin. Rec. 867-868, 1301-1302. Respondent did not seek a permit for the new tower. Instead, he advised the City that the tower was a "mobile" antenna not covered by the Municipal Code. Although respondent later lowered the tower to 75 feet, he declined to remove or fully retract it. *Id.* at 868, 966-967. The City filed an action for declaratory and injunctive relief against respondent in Los Angeles County Superior Court on April 12, 1999, alleging that the antennae and their commercial use violated the City's zoning laws. On September 13, 1999, the Superior Court preliminarily enjoined respondent's unauthorized commercial use of the towers and required him to remove the trailer-mounted tower. C.A. E.R. 21-23.

b. After the Superior Court issued the injunction, respondent applied for a conditional use permit (or "CUP") to allow him to offer commercial radio services using the 52.5-foot antenna tower in his yard. The Staff of the City's Planning Department prepared an 18-page report assessing the impact of converting the tower to commercial use. Admin. Rec. 553-570; *id.* at 878-885. The Report recommended that the application be denied. *Id.* at 556-562. After conducting two hearings and taking written evidence, the Planning Commission adopted a resolution denying the application. Pet. App. 54a-64a. The resolution stressed the tower's "visual[] prominen[ce] within the neighborhood" and its "negative visual impacts." *Id.* at 57a, 60a-61a. The Commission found that the commercial use of such a visually prominent structure would be inconsistent with the residential purpose and character of the neighborhood, as well as the City's Antenna Development Guidelines, which encourage the placement of commercial antennae "in non-single family residential areas." *Id.* at 59a, 60a. The Commission

addressed, and found its decision consistent with, each of the Communications Act's requirements. *Id.* at 61a-63a.

Respondent appealed to the City Council. After further public hearings, the Council adopted a resolution upholding the Planning Commission. Pet. App. 34a-53a. Like the Planning Commission, the City Council concluded that the proposed commercial use was inconsistent with the neighborhood's zoning, which designated it for detached, single-family residences. That designation permits "accessory" structures, *i.e.*, structures closely linked, incidental, and subordinate to the property's use as a single-family residence. The Council found that a commercial antenna is neither incidental nor subordinate to the property's primary use as a residence. *Id.* at 43a.

The Council noted that, when the City authorized respondent to build the antenna structure, he "expressly agreed" that it "was not to exceed forty feet in height" and was "not to be used for commercial purposes." Pet. App. 39a-40a. "Notwithstanding those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet," *id.* at 40a, and respondent used it for commercial purposes, *id.* at 34a-35a. "[I]t appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet," the Council found, "was to accommodate the commercial use[s]." *Id.* at 40a-41a.

The Council found that the tower and antenna array were "highly visible" and had adverse "visual and aesthetic impacts" on the surrounding neighborhood. Pet. App. 46a, 48a. Because of the tower's height, configuration and proximity to surrounding lots and rights-of-way, as well as the small size of respondent's lot, the Council found that the adverse visual impacts could not be addressed except by modifying the tower's height, location, or configuration. *Id.* at 38a-39a, 41a. Respondent, however, advised the Council "that he would not consider any alteration or reduction of

the height, size, configuration or location of the existing tower." *Id.* at 39a; see *id.* at 41a, 46a-47a.

The City Council noted that permitting commercial use of the tower would not, by itself, alter the tower's visual impact. But the Council found that commercial use of the 52.5-foot tower would "perpetuate [its] existing adverse visual impacts." Pet. App. 41a.[3] Echoing the Planning Commission's concerns, see *id.* at 51a, 60a, the Council also found that "the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects," harming both "aesthetics and residential property values," *id.* at 41a. "Such proposals are likely," the Council observed, "given the neighborhood's elevation * * * and unique geographic setting." *Ibid.*

Finally, the City Council found that its decision was consistent with 47 U.S.C. § 332(c)(7). There was no discrimination among service providers because the denial rested on the tower's "adverse visual and aesthetic impacts" and respondent's refusal to mitigate those effects. Pet. App. 48a. Nor did the denial prohibit the provision of wireless services. *Ibid.* Many companies, the City noted, were providing wireless service throughout the City "from facili-

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[3] Although the Council did not elaborate on the finding of "perpetuation," it appears to reflect two concerns. First, so long as the tower was used solely to support an amateur hobby, it could be seen as a transitory structure that would be removed when the resident moved or gave up the hobby (and would be lowered when not in use). Converting it to commercial use, in contrast, would create business reliance and afford the tower greater permanence. Second, the Council appeared to be concerned that granting the permit would accord the 52.5-foot tower, which was then of questionable legality, permanent status as a lawful structure. See p. 6, n.2, *supra*; Pet. App. 24a n.5 (addressing claim that, after denying the permit, the City might require that the tower be reduced in height or removed).

ties that are not causing" such "adverse visual and aesthetic impacts." *Id.* at 49a. The City's expert "demonstrated that" respondent's "ability to transmit would be increased" by using another site that would not present the same zoning issues. *Id.* at 45a; see *id.* at 47a, 49a-50a.

3. Respondent then filed suit in United States District Court for the Central District of California, alleging that the City violated 47 U.S.C. § 332(c)(7) by denying him a conditional use permit. Invoking 47 U.S.C. § 332(c)(7)(B)(v), respondent sought an injunction requiring the City to issue a permit allowing commercial use of the tower. Respondent also sought damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, asserting that the City had violated his rights under the Communications Act. C.A. E.R. 13-14, 18; Supp. C.A. E.R. 74-82. The district court initially stayed that action in light of the City's suit in Los Angeles Superior Court, see p. 7, *supra*, but lifted the stay after the Superior Court entered judgment for the City in May 2001.

Following trial on a stipulated administrative record, the district court ruled for respondent, holding that the City's decision was not supported by "substantial evidence" as required by 47 U.S.C. § 332(c)(7)(B)(iii). Pet. App. 16a-33a. The City's concern about the tower's visual impact, the district court held, was insufficient to justify denying the permit because the "antenna is already in existence, and thus there is no further aesthetic impact created by [respondent's] proposed use." *Id.* at 23a. The district court rejected the City's argument that permitting commercial use would contradict the "original intention of the 1990 permit" and "lead to the proliferation of more antennas," labeling the former rationale "immaterial," *id.* at 24a, and the latter "unfounded," *id.* at 25a. Other antenna applications might follow, but the City could deny permits that threaten "an increase in visual blight." *Ibid.*[4]

The district court declined to resolve respondent's claim that the City had unreasonably discriminated among providers of functionally equivalent services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). Pet. App. 29a-30a & n.8. The court, however, rejected respondent's claim that the City had precluded the provision of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). Pet. App. 30a-32a. Other providers had successfully operated in the City consistent with municipal requirements, and there was at least one alternative site for respondent's antenna. *Id.* at 31a-32a.

The court concluded that 47 U.S.C. § 332(c)(7)(B)(v) afforded it "broad authority" to fashion "an appropriate remedy that would bring expedited relief." Pet. App. 32a. After additional briefing and argument, the court entered

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[4] The district court recognized that conversion of amateur antennae to commercial use creates the potential for abuse. Pet. App. 29a-30a. Amateur antennae are permitted under more lenient standards pursuant to an FCC decision known as "PRB-1," which requires their reasonable accommodation. See 101 FCC 2d 952, 953 (1985). Because there ordinarily is no economic incentive to build amateur antennae, they seldom present a risk of undue concentration. If amateur antennae could be readily converted to commercial use, however, those seeking to build commercial antennae in residential areas could first establish "amateur" antennae under more permissive criteria and then demand permission to convert the antennae to commercial use. (After decision in this case, another Rancho Palos Verdes property owner constructed twenty antennae across a rooftop and sought permission to put them to commercial use; that case is in litigation. *Kay* v. *City of Rancho Palos Verdes*, No. CV-02-03922 (C.D. Cal. May 15, 2003)). Here, the district court saw no evidence that respondent had obtained an amateur *radio license* with dubious intentions, Pet. App. 29a, but "acknowledge[d] th[e] potential problem" and "regulatory quandary" that conversions present. *Id.* at 29a-30a. The court declined to address the City's concern about subversion of the regulatory process, however, because it "was not stated in the record." *Id.* at 30a & n.8.

an order vacating the City's denial of respondent's application, remanding the matter to the City, and enjoining the City to grant the application subject to reasonable conditions. *Id.* at 13a-15a. The district court denied respondent's "request for damages under 42 U.S.C. § 1983" and his corresponding request for "attorney's fees under 42 U.S.C. § 1988." Pet. App. 15a. The remedies for the Communications Act violations, the court stated, "are subsumed" within the Act's review provisions, and "damages pursuant to 42 U.S.C. § 1983 are not available." Pet. App. 14a.[5]

4. Respondent appealed the district court's denial of damages and fees under 42 U.S.C. §§ 1983 and 1988, and the Ninth Circuit reversed. Pet. App. 1a-12a. The Ninth Circuit acknowledged that, under *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, a party cannot use Section 1983 to assert the violation of a federal statute if that statute establishes a "comprehensive" remedial scheme that is incompatible with Section 1983 remedies. Pet. App. 4a. The Ninth Circuit concluded that the Communications Act, through 47 U.S.C. § 332(c)(7)(B)(v), creates a "right of action" for "expedited judicial review" of any final state or local government decision, subject to "a short statute of limitations (30 days)." Pet. App. 5a-6a. But the Ninth Circuit held that the Communications Act's remedial scheme is not sufficient to "close the door on § 1983 liability" because it "does not provide for any type of relief" and "contain[s] no remedies at all." *Id.* at 6a, 7a-8a.

The Ninth Circuit rejected the Third Circuit's decision in *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687 (2002), which had reached the opposite conclusion. Pet.

[5] Following the district court's decision, the California Court of Appeal reversed the Superior Court injunction against respondent's commercial use of his antenna. *Rancho Palos Verdes* v. *Abrams*, 101 Cal. App. 4th 367, 370 (2002).

App. 8a.[6] The Ninth Circuit first faulted *Nextel*'s conclusion that the expedited cause of action for judicial review created by 47 U.S.C. § 332(c)(7)(B)(v) is "remedial." Pet. App. 8a. That provision's short limitations period, the Ninth Circuit stated, "can hardly" be considered remedial, since it "imposes a burden on an aggrieved plaintiff, not a benefit." *Ibid.* Similarly, the Ninth Circuit declared that expedited judicial review "is hollow" because it "does nothing to remedy" a Communications Act "violation in itself." *Id.* at 8a-9a. On the issue of damages, the Ninth Circuit conceded that the "lack of any damages" under Section 332(c)(7)(B)(v) could be construed as "evidence that Congress impliedly intended to foreclose damages." Pet. App. 7a. But the Ninth Circuit held that the "better justification for" that omission was "that Congress intended" for plaintiffs to obtain that relief (plus attorney's fees) by "invok[ing] § 1983." *Ibid.*

The Ninth Circuit dismissed the Third Circuit's concern that allowing Section 1983 suits under the four-year limitations period provided by 28 U.S.C. § 1658 would undermine the 30-day period imposed by 47 U.S.C. § 332(c)(7)(B)(v). Pet. App. 8a (citing *Nextel*, 286 F.3d at 695). "Congress can limit the time in which a plaintiff can file," the Ninth Circuit stated, "without inadvertently limiting the plaintiff's remedies at the same time." *Id.* at 9a.

Finally, the Ninth Circuit relied on the savings clause in Section 601(c)(1) of the 1996 Act, codified as 47 U.S.C. § 152 (note). Pet. App. 10a-11a. That provision states that the 1996 Act "shall not be construed to modify, impair, or

[6] After argument but before the Ninth Circuit issued its decision, the Seventh Circuit held that Section 1983 and 1988 remedies are unavailable. *PrimeCo Personal Communications, L.P. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003). The parties brought the Seventh Circuit's decision to the Ninth Circuit's attention, but the Ninth Circuit's opinion did not discuss it.

supersede Federal, State, or local law unless expressly so provided." *Id.* at 10a. The Ninth Circuit stated that construing rights created by the 1996 Act to be enforceable solely through that Act's review provisions would "impair" Section 1983. *Ibid.* The Ninth Circuit conceded that this Court had rejected a similar argument in *Sea Clammers*, 453 U.S. at 15-16. But the Ninth Circuit distinguished the savings clauses in *Sea Clammers* on the ground that those clauses preserved federal "rights," whereas the savings clause here preserves federal "laws." Pet. App. 11a-12a.

Accordingly, the Ninth Circuit held that "Section 1983 remedies are available" and that "the district court should award § 1983 damages" in this case. Pet. App. 12a. On March 16, 2004, the Ninth Circuit denied rehearing and rehearing en banc. *Id.* at 65a.

SUMMARY OF ARGUMENT

I. A. The Communications Act provides a comprehensive remedial scheme that, under *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, precludes suits for damages and fees under more general remedial provisions such as 42 U.S.C. §§ 1983 and 1988.

B. Throughout the Communications Act, Congress both established legal duties and specified the means for their enforcement. When Congress amended the Communications Act in 1996 and added 47 U.S.C. 332(c)(7)—a provision entitled "Preservation of local zoning authority"—Congress adhered to that pattern. Thus, while Section 332(c)(7) imposes certain limits on state and local authority, it also provides calibrated enforcement mechanisms that carefully balance traditional state and local control over zoning and land-use with federal interests. Recognizing the importance of state and local administrative proceedings, Section 332(c)(7)(B) first provides for resolution of zoning disputes through those processes. Importantly, Section 332(c)(7)(B)(v) then provides a carefully tailored and expedited private judicial remedy for any person "adversely affected by" a state or local government's "final action or failure to act," subject to a 30-day limitations period.

C. Enforcement under Section 1983 would be inconsistent with the specific and calibrated statutory remedy that Section 332(c)(7) provides. Permitting suit under Section 1983 would permit bypass of Section 332(c)(7)(B)(v)'s 30-day limitation period and mandatory expedition, undermining that mechanism for speedy resolution; contravening traditional state rules; and undercutting the Act's goal of "rapid deployment of new telecommunications technologies" for public benefit. Moreover, Section 1983 carries with it attorney's fees under Section 1988—relief that is notably absent from Section 332(c)(7)(B)(v) and is wholly inconsistent with Congress's goal of preserving (rather than eroding) state and local authority in this area of traditional state concern.

D. This Court has observed that the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). No less than the statutes in those cases, Section 332(c)(7) "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." While this Court will not lightly infer an intent to withhold judicial review, it should not lightly infer duplicate (and inconsistent) mechanisms for obtaining review.

E. The Ninth Circuit's holding that Section 332(c)(7)(B)(v) is not remedial—because it provides "no remedies"—cannot be squared with that provision's text and purpose, or with common sense. Congress intended Section 332(c)(7)(B)(v) to provide a mechanism for judicial relief. Further, a cause of action that does not permit the imposition of remedies would be non-justiciable; federal courts cannot

issue advisory opinions absent relief that alters the legal relationship of the parties. While Section 332(c)(7)(B)(v) does not enumerate the appropriate remedies, this Court has long presumed that such statutes empower federal courts to provide any appropriate relief.

In this context, the traditional and thus appropriate remedy for an erroneous municipal decision has long been specific relief (*e.g.*, an injunction). Federal courts hearing cases under Section 332(c)(7)(B)(v) thus have authority to award aggrieved persons precisely what they sought in the first instance—authority to construct or modify the disputed facility—by enjoining the municipality to issue the permit. Every court to have considered the matter (other than the Ninth Circuit) has agreed.

The Ninth Circuit's conclusion that Congress's *refusal* to provide for damages under Section 332(c)(7)(B)(v) evinces its intent to *permit* actions for damages and fees under Sections 1983 and 1988 defies *Sea Clammers* and its progeny. Those cases recognize that Congress's decision to limit or condition statutory remedies ordinarily precludes efforts to bypass such restrictions through Section 1983.

II. The Ninth Circuit's decision is also impossible to reconcile with traditional tools of statutory construction.

A. Courts properly presume that Congress is unlikely to intend any drastic departures from settled practice, absent an express statement to the contrary. That is particularly true with respect to legislation touching on matters of traditional state and local concern. Imposing damages and attorney's fees for otherwise ordinary errors in the administration of zoning and land-use laws is wholly contrary to longstanding traditions—traditions that Congress sought to emulate rather than overturn.

B. The text of the Communications Act forecloses the Ninth Circuit's contrary ruling. The 1996 Act's savings clause—Section 601(c)(1), 47 U.S.C. § 152 (note)—directs

that the Act "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in" the Act itself. Reading the 1996 Act to expand Section 1983 liability into this new context would impair ubiquitous state immunity laws that otherwise shield municipalities from liability for land-use decisions.

C. As originally proposed, the 1996 Act would have vested the FCC with authority to preempt state and local zoning laws. The legislative history belies any suggestion that FCC preemption would have led to the imposition of monetary liability. It is implausible to suppose that Congress, by adopting amendments to preserve local zoning authority, intended to impose that liability.

III. Finally, the Ninth Circuit erred in interpreting the Act's savings clause, Section 601(c)(1), as "preserving" a right to bring Section 1983 suits for violations of 47 U.S.C. § 332(c)(7). In *Sea Clammers*, this Court rejected the same construction of similar savings clauses. The Ninth Circuit's reasoning—that the 1996 Act "impairs" Section 1983 unless the interests created by the 1996 Act are enforceable under Section 1983—also defies logic. There was no right to enforce 47 U.S.C. § 332(c)(7) through damages actions under Section 1983 before the 1996 Act was adopted, and there is no such right now. Congress thus did not "impair" Section 1983 in the 1996 Act; Congress merely declined to expand the claims that may be asserted under Section 1983. Indeed, the expansion of Section 1983 liability the Ninth Circuit envisioned would itself be contrary to Section 601(c)(1), as it would impair state immunity laws that otherwise shield municipalities from damages liability for ordinary (even if mistaken) land-use decisions.

ARGUMENT

The Communications Act "is a comprehensive scheme for the regulation of interstate communication." *Benati* v. *United States*, 355 U.S. 96, 104 (1957). Consistent with that

scope, the Act—in provision after provision—both establishes federal regulatory requirements and specifies the means of private and governmental enforcement. When Congress amended the Communications Act through the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, it adhered to that pattern, again establishing federal limits and specifying the means of enforcement.

Of central importance here, the 1996 Act added 47 U.S.C. § 332(c)(7)—a provision entitled "Preservation of local zoning authority." Section 332(c)(7) protects traditional state and local zoning and land-use authority in connection with the siting and construction of antenna towers and other facilities used to provide wireless telephone service. 47 U.S.C. § 332(c)(7)(A). At the same time, it imposes certain limits on that authority, proscribing, for example, unreasonable discrimination among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(I), and regulations that foreclose the provision of wireless service altogether, 47 U.S.C. § 332(c)(7)(B)(i)(II); p. 3, *supra*.

Consistent with the object of preserving local zoning authority—and consistent with the pattern throughout the Act—Congress paired those federal limits with carefully calibrated mechanisms to ensure their vindication. Those mechanisms reflect and emulate traditional zoning and land-use principles that have long governed in this context. Congress required (among other things) that any decision to "deny" a request to build or modify a wireless facility "be in writing," and be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii); p. 4, *supra*. Importantly, Congress also provided for expedited judicial review of "final" decisions alleged to violate Section 332(c)(7)(B)'s requirements. In particular, 47 U.S.C. § 332(c)(7)(B)(v) permits any person "adversely affected" by final action or a failure to act to file an action "in any court of competent jurisdiction"; requires that "such

an action be filed within a very short period—30 days"; and "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (3d Cir. 2002) (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

Applying *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and its progeny, the Third and Seventh Circuits have concluded that Section 332(c)(7) provides its own comprehensive remedial scheme and that, as a result, violations may not be asserted as actions for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. *Nextel*, 286 F.3d at 694; *PrimeCo Personal Communications, L.P. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (7th Cir. 2003). As the Third Circuit explained, the remedial mechanisms in Section 332(c)(7) are "not complicated" but are "comprehensive in the relevant sense," providing "private judicial remedies that incorporate both notable benefits and corresponding limitations." 286 F.3d at 694. Expedited review benefits plaintiffs by "provid[ing] speedy redress for violations of the Act," while the short 30-day filing deadline both echoes traditional state procedure and limits the potential harm that might result from inappropriate delay. *Id.* at 695.

"Allowing plaintiffs to assert" Communications Act claims under Section 1983, those courts held, "would upset th[e] balance" that Congress established in Section 332(c)(7). A "plaintiff would be freed of the short 30-day limitations period and would instead presumably have four years to commence the action. See 28 U.S.C. § 1658." 286 F.3d at 695. Courts "would also presumably be freed of the obligation to hear the claim on an expedited basis." *Ibid.* And, "[p]erhaps most importantly, attorney's fees would be available." *Ibid.*

In the decision below, the Ninth Circuit reached the opposite result, superimposing the heavy sanctions of 42 U.S.C. § 1983 and § 1988 over the tailored review provisions

of Section 332(c)(7)(B)(v). That result cannot be reconciled with this Court's cases or Congress's evident intent. It rests on an unfounded reading of the Communications Act—that Section 332(c)(7)(B)(v) provides "no remedies at all" and that expedited judicial review is a "hollow" promise that "does nothing to remedy" a "violation in itself." Pet. App. 8a-9a. It departs from *Sea Clammers* and its progeny. Those cases recognize that, when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." 453 U.S. at 20 (internal quotation marks omitted). Here, the Ninth Circuit treated deliberate and important limits on the remedies contemplated by Section 332(c)(7) as a reason to *permit* circumvention through Section 1983. It deemed the 30-day limitations period for seeking judicial review irrelevant because it "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. And it treated Congress's decision to omit a damages remedy under Section 332(c)(7)(B)(v) as evidence that Congress intended to make damages and fees available under 42 U.S.C. §§ 1983, 1988. Pet. App. 7a-8a.

Ultimately, the Ninth Circuit's decision cannot be reconciled with "[t]he crucial consideration," which "is what Congress intended." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997) ("inquiry focuses on congressional intent"). It is an ordinary principle of statutory construction that Congress is unlikely to intend radical departures from past practice absent an express indication of that intent—particularly where, as here, Congress is addressing a matter of core state and local concern. In this context, the traditional rule is that mistaken zoning decisions are remedied through judicial review and orders for equitable—*e.g.*, injunctive rather than damages—relief. Imposing the heavy sanctions of damages and attorney's fees on local governments for

every mistaken exercise of traditional zoning and land-use power would represent a radical departure from that practice and would be wholly at odds with Congress's express intent to "preserve" state and local authority in this area. Far from evincing an intent to upset and depart from traditional modes, Section 332(c)(7) demonstrates Congress's intent to emulate them. Reading the Communications Act to impose damages and fees under Section 1983, moreover, would "impair" the numerous state laws that otherwise limit municipal liability for zoning and land-use decisions. That would be contrary to Section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 (note), which precludes such impairments of state and local law except where the 1996 Act expressly provides for them.

I. The Communications Act Establishes A Comprehensive Remedial Scheme For The Enforcement Of Federal Requirements.

A. Section 1983 and 1988 Remedies Are Not Available Where Congress Has Provided A Comprehensive Remedial Scheme.

Section 1983 creates a cause of action for the violation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, while Section 1988 entitles successful Section 1983 plaintiffs to attorney's fees. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983). In 1980, this Court concluded that the cause of action created by Section 1983, and associated remedies under Section 1988, are available not only for violations of constitutional rights, but also for violations of certain statutory rights. *Maine* v. *Thiboutot*, 448 U.S. 1, 12-13.

Since then, this Court has clarified that, "to seek redress through § 1983 * * * a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340-341. The statute thus must textually focus on and create "rights" in the plaintiff; it is not suffi-

cient that the statute simply limit the actions or authority of the defendant. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 287 (2002); see *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'") (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)).

Moreover, the cause of action under Section 1983 is not available where Congress has provided a comprehensive remedial scheme in the federal statute allegedly violated. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20. Likewise, if "allowing § 1983 actions * * * 'would be inconsistent with Congress' carefully tailored scheme,'" relief is limited to that provided in the underlying statute. *Blessing*, 520 U.S. at 346. "[T]he crucial consideration is what Congress intended." *Smith* v. *Robinson*, 468 U.S. at 1012.

This Court has repeatedly concluded that—where Congress enacts a statute that simultaneously establishes a federal interest and provides tailored means for its vindication (such as private judicial remedies)—Congress intends enforcement through that specific and tailored procedure rather than damages actions under more general remedial statutes such as Section 1983. In *Sea Clammers*, for example, the Court found that the "elaborate" enforcement provisions of the statutes at issue there, "including the two citizen-suit provisions," 453 U.S. at 20, demonstrated that Congress "intended to supplant any remedy that otherwise would be available under § 1983," *id.* at 21.

Three years later, in *Smith* v. *Robinson*, *supra*, the Court again concluded that Congress had established an enforcement mechanism that precluded resort to Section 1983. The statute at issue there—the Education of the Handicapped Act (EHA), 84 Stat. 175, as amended, 20

U.S.C. § 1400 *et seq.*—provided "a 'carefully tailored administrative and judicial mechanism,' 468 U.S., at 1009, that included local administrative review and culminated in a right to judicial review. [468 U.S.] at 1011 (citing 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415)." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990). Relying on those features, the federal courts had generally agreed that the EHA "may not be claimed as the basis for a § 1983 action." *Smith* v. *Robinson*, 468 U.S. at 1008 n.11. Invoking the same considerations, this Court concluded that constitutional equal protection claims could not be asserted through Section 1983 if the same claims could be asserted under the EHA. "Allowing a plaintiff to circumvent the EHA administrative remedies" by bringing suit under Section 1983 "would be inconsistent with Congress' carefully tailored scheme." *Id.* at 1012; see *id.* at 1011 n.14 ("[N]othing in Section 1983 requires a plaintiff to exhaust his administrative remedies before bringing a § 1983 suit.").

Likewise, in *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1978), this Court concluded that violations of Title VII's prohibition on employment discrimination cannot be asserted through 42 U.S.C. § 1985(3).[7] The Court observed that, under Title VII, "[t]he time limitations for administrative and judicial filing are controlled by express provisions of the statute," and "the Act expressly authorizes only equitable remedies." 442 U.S. at 374-375. Suit under Section 1985(3) would upset the resulting balance: "If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law"; among

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[7] Like Section 1983, 42 U.S.C. § 1985(3) originates from the Civil Rights Act of 1871, 17 Stat. 13. Like Section 1983, Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny*, 442 U.S. at 372.

other things, "[t]he short and precise time limitations of Title VII would be grossly altered." 442 U.S. at 375-376.

Those same considerations demonstrate that Congress intended Section 332(c)(7) to be enforced through the remedial scheme created by the Communications Act itself—not through actions for damages and fees under Sections 1983 and 1988. The Communications Act establishes a remedial regime that is comprehensive in every relevant respect. It repeatedly identifies both regulatory limitations and the available means of private or governmental enforcement. As in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, enforcement through Section 1983 is inconsistent with the tailored requirements and careful balance that Congress established—through a combination of local administrative review followed by expedited judicial review under a strict limitations period—in the Communications Act itself. As in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, Congress expressly "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). Finally, here, even more than in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, enforcement through the heavy sanctions of Sections 1983 and 1988 for mistaken zoning and land-use decisions cannot be reconciled with Congress's express intent to "[p]reserv[e]" "local * * * authority" in this area of traditional state and local concern.

B. The Communications Act Provides A Comprehensive Remedial Regime

No less than the statutes at issue in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny*, the Communications Act provides an extensive and comprehensive remedial regime. In provision after provision of that Act, Congress specified both the legal duty and the appropriate governmental and private remedies. See, *e.g.*, 47 U.S.C. § 202(c) (penalty for

common carriers' unjust or unreasonable discrimination in charges and practices); 47 U.S.C. § 203(e) (penalty for tariff violations); 47 U.S.C. § 205 (penalty for violation of rate orders); 47 U.S.C. §§ 206-207 (private action for damages and attorney's fees for persons injured by common carrier violations); 47 U.S.C. § 227(b)(1)(C), (3) (prohibition on certain uses of telephone, with private action for injunctive relief, actual damages, statutory damages, and treble damages in specified circumstances); 47 U.S.C. § 231 (fines and civil penalties, but no private action, for violations of internet minor-access restrictions); 47 U.S.C. § 605(e)(3) (private action for unlawful interception of communications, including injunctions, damages computed under statutory criteria, and "reasonable attorneys' fees").

When Congress amended the Communications Act in 1996, it followed the same deliberate pattern, establishing both specific requirements and the corresponding mechanisms for redress. See, *e.g.*, 47 U.S.C. § 258 (prohibiting changes to telephone service provider absent verification procedures and providing damages to the disconnected carrier "in an amount equal to all charges paid by such subscriber after such violation"); 47 U.S.C. § 274 (authorizing damages action or complaint to the Commission for violations of electronic publishing restrictions). Section 332(c)(7) is an integral part of that comprehensive remedial regime. Directed to a specific issue of federal, state, and local concern—the relationship between zoning and the development of wireless infrastructure—Section 332(c)(7) both identifies the substantive requirements of federal law (preventing state and local governments from prohibiting service altogether, for example) and specifies the means for their vindication.

Recognizing the traditional importance of state and local administrative processes, Section 332(c)(7) first provides for resolution in those proceedings. It requires state and local governments to act "on requests for authorization to place,

construct, or modify personal wireless facilities within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); requires that any decision to "deny" such requests "be in writing," 47 U.S.C. § 332(c)(7)(B)(iii); and requires that such decisions be "supported by substantial evidence contained in a written record," *ibid.* Critically, Section 332(c)(7) then provides an express and carefully tailored expedited judicial remedy "through which a plaintiff can redress" violations of Section 332(c)(7). Pet. App. 5a-6a (citing 47 U.S.C. § 332(c)(7)(B)(v)); H.R. Conf. Rep. No. 458, *supra*, at 208 (provision is a "mechanism for judicial relief from zoning decisions that fail to comply" with federal requirements).

In particular, any person adversely affected by a state or local government's "final action or failure to act"—which "means final administrative action at the State or local government level," H.R. Conf. Rep. No. 458, *supra*, at 209—may "file an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) also establishes careful conditions on such suits, requiring that "such an action be filed within a very short period—30 days"; and "correspondingly requir[ing] the court to 'hear and decide such action on an expedited basis.'" *Nextel*, 286 F.3d at 694-695 (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

Even within Section 332(c)(7)(B)(v), Congress's careful elaboration of options is evident. While Congress provided *all* adversely affected persons with the ability to enforce Section 332(c)(7)(B)'s requirements in federal court, it provided those aggrieved by certain violations with the alternative of federal administrative enforcement followed by judicial review. In particular, Section 332(c)(7)(B)(v) authorizes "any person adversely affected by" a violation of Section 332(c)(7)(B)(iv)—which prohibits state and local regulation based on the environmental effects of radio frequency emissions—to bring an action in court *or* "petition the [FCC] for relief." The FCC handles such requests as petitions for declaratory rulings, see p. 5, *supra*,

which in turn are subject to judicial review under 47 U.S.C. § 402(b) and 28 U.S.C. § 2342. See also 47 U.S.C. § 401.

As the Court recognized in *Sea Clammers*, the presence of such an "elaborate" and detailed enforcement regime indicates that Congress "provided precisely the remedies it considered appropriate" and "supplant[ed] any remedy that otherwise would be available under § 1983." 453 U.S. at 14-15, 20-21. Cf. *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988). Here, as in *Sea Clammers*, the elaborate regime makes it clear that Congress carefully identified and elected the enforcement mechanisms it thought most suitable. Where Congress intended a particular method of enforcement—or sought to provide unusual relief such as attorney's fees—it expressly so provided in the Communications Act itself.[8]

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[8] Respondent has urged (Br. in Opp. 19-20) the Court to ignore many of these detailed provisions on the ground that they "provide for private redress in situations where *non-governmental* persons violate the statute." That plea is misplaced for two reasons. First, the cited provisions apply with equal force to government actors, including the many municipalities that operate their own local telephone companies. Second, and more important, the fact that Congress enacted provisions such as Section 332(c)(7) expressly for the purpose of limiting and providing judicial redress for certain state and local government activities is evidence of the Act's comprehensiveness. The Act contrasts sharply with the statutes at issue in *Livadas* v. *Bradshaw*, 512 U.S. 107 (1994), and *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103 (1990), where there was an "intricate scheme * * * to remedy violations by private actors" but a "complete absence of provision for relief from governmental interference." 512 U.S. at 133. Here, Congress directly addressed state and local conduct, providing limits and a calibrated mechanism for judicial redress.

C. Enforcement Through Section 1983 Would Be Inconsistent With Section 332(c)(7)(B)(v)

This Court has recognized that the general remedial mechanism of Section 1983 may not be invoked where "[a]llowing a plaintiff" to bring such an action "would be inconsistent with Congress' carefully tailored regime." *Smith* v. *Robinson*, 468 U.S. at 1011; *Blessing*, 520 U.S. at 341 (Section 1983 not available if statutory remedies are "incompatible with individual enforcement under § 1983"). Such is precisely the case here.

As the Third Circuit observed in *Nextel*, Section 332(c)(7)(B)(v) establishes a careful balance. 286 F.3d at 694. The cause of action it creates requires expedition, "provid[ing] speedy redress for violations of the Act." *Id.* at 695. In addition, it imposes a 30-day filing period. *Ibid.* That deadline ensures that affected persons seek relief quickly, consistent both with traditional zoning requirements (see p. 42, *infra*) and with Congress's intent to avoid delays that might interfere with the goal of "rapid deployment of new telecommunications technologies" for public benefit. 1996 Act, 110 Stat. at 56. Finally, the Act "makes no provision for attorney's fees." 286 F.3d at 695.

1. "Allowing plaintiffs to assert" Communications Act claims "under § 1983 would upset this balance." *Nextel*, 286 F.3d at 695. For one thing, a "plaintiff would be freed of the short 30-day limitations period" for filing suit under Section 332(c)(7)(B)(v). 286 F.3d at 695. Instead, a plaintiff would "have four years to commence" a Section 1983 action under "28 U.S.C. § 1658." 286 F.3d at 695; see *Jones* v. *R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1845 (2004). A more dramatic inconsistency is difficult to imagine.

2. Allowing suit under Section 1983 would also "free[]" courts "of the obligation to hear the claim on an expedited basis." 286 F.3d at 695. The absence of mandatory expedition does not merely harm litigants who must bear losses

that accrue during delay. It harms the public interest in the "*rapid* deployment of new telecommunications technologies" that Congress sought to promote. By imposing a 30-day filing period and mandating expedited review under the Communications Act, Congress provided a mechanism for rapid and streamlined resolution of antenna siting decisions in the public interest. Replacing that mechanism with a 4-year limitations period and ordinary time frames for judicial resolution under Section 1983 would grossly undermine Congress's intent.

3. Finally, unlike Section 332(c)(7)(B)(v), which follows the presumptive "American" rule that each party must bear its own fees, Sections 1983 and 1988 make attorney's fees available to prevailing plaintiffs. That heavy sanction is in considerable tension with Section 332(c)(7)'s title and primary purpose, which is "*preservation* of local zoning authority." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section" are "tools available for the resolution of a doubt about the meaning of a statute.").

That tension is exacerbated by the nature of disputes under Section 332(c)(7). Like other Communications Act provisions, Section 332(c)(7) is highly technical and "fairly bristles with potential issues," *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999), creating ample opportunity for dispute and good-faith error.[9] The FCC,

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[9] That complexity and the resulting legal uncertainty have not been lost on the federal courts. *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630, 641 (2d Cir. 1999) (determining whether the service qualifies as "personal wireless service" requires "a detailed parsing of the statutory language, including layers of highly technical definitions"); *Aegerter* v. *City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999) (adopting antitrust market definitions to determine whether services are "functionally equivalent"); *Omnipoint Holdings* v. *Town of Westford*, 206 F. Supp. 2d 166, 169 (D. Mass. 2002) (noting the "difficulty of effectuating the Congressional compromise" embodied

the expert federal agency tasked with administering the Communications Act, itself is often overturned by the courts in its implementation of the Act (yet never pays damages). It is thus inevitable that local governments—particularly small, rural municipalities—will sometimes "stumble, albeit in an earnest attempt to comply with the Telecommunications Act." *City of Atlanta*, 50 F. Supp. 2d at 1361; *Nextel*, 286 F.3d at 695; *National Telecomm. Advisors* v. *City of Chicopee*, 16 F. Supp. 2d 117, 122 (D. Mass. 1998) (similar).

Because "municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983," *Leatherman* v. *TCNICU*, 507 U.S. 163, 166 (1993), permitting Section 1983 actions in this context threatens significant liability for virtually every mistake in implementing the Act's often complex requirements. The potential exposure is enormous. Each year, municipalities must address tens of thousands of applications to construct wireless facilities. Over the last decade, the number of cell towers increased

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in Section 332(c)(7)). There are disputes over the extent to which "[a]esthetic concerns may be a valid basis for denial of a permit," *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002); see *Oyster Bay*, 166 F.3d at 495; and what constitutes "regulation" of wireless facilities, *Sprint Spectrum, L.P.* v. *Mills*, 283 F.3d 404 (2d Cir. 2002). The federal courts are also grappling with whether the requirement of a "decision * * * in writing" mandates not merely a written resolution but also a written explanation for the result. See *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998); *PrimeCo PCS* v. *Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998). See also Br. Local Gov't Amici 18, 28 (noting additional uncertainties). Many similar issues arose in this litigation. Admin. Rec. 793 (whether respondent's service is "personal wireless service" covered by Section 332(c)(7)); Pet. App. 24a (whether aesthetic concerns can constitute "substantial evidence"); *id.* at 30a (whether "substantial evidence" requires rationale to appear in the written decision or merely in the record).

from 25,000 to 165,000; according to the Cellular Telephone Industry Association, more than 23,000 new cell sites were added in 2003 alone; and there is no sign the expansion will abate. T. Baldas, *Cell Towers Lead to Litigation Static*, Nat'l L.J., Aug. 2, 2004, at 1, 26; see <http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030>. Under the Ninth Circuit's view, each proposal for a new or modified cell site represents a potential damages and fee award.

Section 332(c)(7) plaintiffs, moreover, "are often large corporations or affiliate[s]," while the "defendants are often small, rural municipalities" that cannot risk significant liability. *Nextel*, 286 F.3d at 695; see *Verizon Wireless*, 352 F.3d at 1152 (suits involving Section 332(c)(7) typically pit "substantial corporations, such as Verizon" against "small towns, such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen."). As Judge Carnes has observed, plaintiffs like AT&T Wireless—"a seven billion dollar subsidiary of a sixty-two billion dollar multi-national corporation"—are "more than happy to serve as 'private attorneys general' to enforce the legislative measures they have lobbied through Congress, without the need for taxpayers to pay their litigation costs." *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir.) (concurring opinion), vacated on reh'g en banc, 260 F.3d 1320, dismissed on settlement, 264 F.3d 1314 (2001). Compared to the budgets of the defendant local governments, the fees incurred by such well-funded and determined plaintiffs can be staggering; a single erroneous zoning decision could cost the smallest of towns hundreds of thousands of dollars—potentially at the expense of basic governmental services. See Br. Nat'l League of Cities, *et al.*, 21-23.

The threat of such awards seriously distorts the decision-making process. Permitting suit under Section 1983 for claimed violations of 47 U.S.C. § 332(c)(7) would not threaten local governments with liability for authorizing a

facility; they would confront that risk only if they deny authorization. Smaller communities that lack sufficient resources to risk damages and attorney's fees thus by necessity may shrink from meaningfully overseeing the placement of the "often unsightly transmission towers that" otherwise "seem to sprout like weeds after a summer rain." *National Tower, LLC* v. *Frey*, 164 F. Supp. 2d 185, 187 (D. Mass. 2001), *aff'd*, 297 F.3d 14 (1st Cir. 2002). The resulting patchwork of towers, sited with little regard for legitimate zoning and planning requirements, would be wholly inconsistent with Congress's goal of preserving state and local authority. The routine imposition of damages and fees thus "stretches the Telecommunications Act too far." *Omnipoint Communications, Inc.* v. *Penn Forest Township*, 42 F. Supp. 2d 493, 507 n.16 (M.D. Pa. 1999).[10]

[10] Permitting suit under Section 1983 is potentially inconsistent with the framework established by the Communications Act in another respect. In providing for judicial review, Section 332(c)(7) generally affords that review after state and local administrative proceedings. The Act contemplates that requests will be filed with state and local governments in the first instance and acted on "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); establishes requirements for such action, *e.g.*, 47 U.S.C. § 332(c)(7)(B)(iii) (requiring "substantial evidence"); and provides for judicial review of "any *final* action or failure to act," 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added); see H.R. Conf. Rep. 458, *supra*, at 208 ("final" action "means final administrative action at the State or local government level"). Requiring requests to be presented through those channels reflects traditional zoning principles and ensures that the "flexibility" provided by administrative procedures can be brought to bear. 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 19.08, at 375-376 (4th ed. 1996); see 4 Young, *supra*, § 27.28, at 593-599; 3 Edward H. Zeigler, Jr., *Rathkopf's The Law of Planning and Zoning* §§ 57.1, 57.2, at 57-4 to 57-13 (1997). As respondent has observed, a "survey by the American Planning Association" shows that "92 percent of applications for cellular towers were approved by local governments, most within 60 days." Br. in Opp. 20. In *Smith v. Robinson*, this Court concluded that permitting suit under Section 1983 would be inconsistent with a statutory regime that similarly provided for "local administrative" processes "culminat[ing] in a right to judicial review." *Wilder*, 496 U.S. at 521 (citing 468 U.S. at 1011). The Court explained that permitting suit under Section 1983 could permit bypass of otherwise required administrative processes, because "nothing in Section 1983 requires a plaintiff to exhaust his administrative remedies before bringing a § 1983 suit." 468 U.S. at 1011-1012 & n.14; see also *Patsy* v. *Florida Bd. of Regents*, 457 U.S. 496 (1982). Likewise here, permitting suit under Section 1983, subject only to often complex ripeness requirements, may create an unacceptable risk that parties will circumvent otherwise mandatory state and local administrative proceedings by invoking Section 1983 to beat an immediate path to federal court—and be rewarded for their haste with the promise of damages and attorney's fees. Just as Congress did not intend Section 332(c)(7) "to give preferential treatment to the personal wireless service industry in the processing of requests," H.R. Conf. Rep. 104, *supra*, at 208, it did not intend to allow that industry to bypass state and local processes altogether.

4. Perhaps recognizing the inconsistency between Section 1983 and the express review mechanisms provided by the Communications Act, respondent urges that the Ninth Circuit's decision avoids such conflicts by "clearly" holding that the 30-day limitations period in Section 332(c)(7)(B)(v) applies to suits under Section 1983. Br. in Opp. 8, 11-12 & n.11, 21. But the Ninth Circuit's opinion neither says that nor justifies such a result. In any event, the theory is legally incoherent. As the Ninth Circuit and other courts have recognized, Section 332(c)(7)(B)(v) creates a cause of action, subject to a 30-day limitations period. Pet. App. 6a; *AT&T Wireless PCS* v. *City Council of Virginia Beach*, 155 F.3d 423, 426 (4th Cir. 1998) ("Section (B)(v) creates a cause of action"). But Section 332(c)(7)(B)(v) does not by its terms apply its 30-day limitations period to any cause of action other than the one that Section 332(c)(7)(B)(v) itself creates. Respondent has nowhere explained why that limit—or the expedition requirement—can be judicially engrafted from Section

332(c)(7)(B)(v) onto the separate cause of action created by Section 1983.[11]

That approach is also at odds with *Sea Clammers* and its progeny. None of those cases transplants statutory limits from a more specific statutory remedial regime into Section 1983 in an effort to reconcile otherwise glaring inconsistencies. *Sea Clammers* did not transplant the requirement of 60-days' notice to defendants from the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act to Section 1983, see 453 U.S. at 14; *Novotny* did not engraft Title VII's procedures and tight limitations periods onto Section 1985(3), 442 U.S. at 375-376; nor did *Smith* v. *Robinson* attach the EHA's procedural requirements to Section 1983, 468 U.S. at 1010-1011. Rather, those cases recognize that, where Congress provides specific remedial procedures inconsistent with suit under Section 1983, Section 1983 remedies are unavailable.

D. Judicial Review Itself Is A Sufficiently Complete Remedy Here

Congress's provision of an express federal cause of action for judicial review in Section 332(c)(7) "through which a plaintiff can redress * * * violations," Pet. App. 5a-6a, by itself suggests an intent to preclude enforcement through Section 1983. This Court has observed that the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*,

[11] Just last Term, this Court emphasized the importance of Section 1658's 4-year limitations period in the context of Section 1983 and other causes of action that do not provide their own limitations periods. *R.R. Donnelly & Sons Co.*, 124 S. Ct. at 1845. Section 1658, the Court explained, eliminates confusing and wasteful litigation created by the former practice of borrowing limitations periods from state law. *Ibid.* It seems premature to overrule *R.R. Donnelly & Sons* and to resume "borrowing" limitations periods for Section 1983.

479 U.S. at 427. See *Kendall* v. *City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999) ("[T]he Supreme Court has repeatedly emphasized that the availability of [private judicial remedies] strongly suggests a Congressional intent to preclude resort to § 1983."); *Nextel*, 286 F.3d at 694 ("A key distinction between schemes that are sufficiently comprehensive and those that are not is the availability of private judicial remedies."). No less than the statutes at issue in those cases, Section 332(c)(7) "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy."

This Court, in fact, has *never* applied *Sea Clammers* to hold that resort to Section 1983's more general remedial scheme is appropriate where, as here, Congress has provided an express private judicial remedy in the underlying statute. The statutes at issue in *Sea Clammers*, *Smith* v. *Robinson*, and *Novotny* each provided a mechanism for private parties to seek federal judicial relief and this Court each time found resort to Section 1983 foreclosed. Conversely, the absence of judicial review combined with other evidence of intent may demonstrate that Congress intended to allow private enforcement through Section 1983. See, *e.g.*, *Blessing*, 520 U.S. at 348 (no "private remedy—either judicial or administrative—through which aggrieved persons can seek redress"); *Livadas*, 512 U.S. at 133 ("complete absence of provision for relief from governmental intereference"); *Golden State Transit Corp.*, 493 U.S. at 107 (similar); *Wilder*, 496 U.S. at 523 (incomplete state administrative remedy insufficient to "evidence[] an intent to foreclose a private remedy in the federal courts"); *Wright*, 479 U.S. at 427-428 ("a state administrative remedy" does not by itself "ordinarily foreclose resort to § 1983"). Private judicial remedies are thus sufficient (although perhaps not necessary) to support a finding of comprehensiveness.

That makes sense. The "rebuttable presumption that" statutory "rights are enforceable under § 1983," *Blessing*, 520 U.S. at 343, reflects the general presumption in favor of judicial review, and the judiciary's extreme reluctance to presume that "Congress has closed the avenue of effective judicial review * * * ." *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970); see *Wright*, 479 U.S. at 428 (relying on *Rosado* v. *Wyman*). Where Congress has *already* provided a specifically tailored statutory remedy that includes judicial review, an "avenue of effective judicial relief" exists under that more specific statutory provision. Such a cause of action also meets Section 1983's purpose "to provide a federal remedy for the enforcement of federal rights." *Wright*, 479 U.S. at 429. This Court, of course, does not "lightly" infer that Congress intended to foreclose review altogether. But it should no more lightly conclude that Congress intended to multiply the avenues of judicial review, particularly where resort to Section 1983 threatens the balance Congress struck in the underlying statute. That is particularly true here, where the plain text of the statute says that, "except as" specifically provided, "nothing in this Act shall limit or affect" local zoning authority.

E. The Ninth Circuit's Reasoning Is Incorrect

1. *Section 332(c)(7) Provides A "Remedial" Scheme*

In the decision below, the Ninth Circuit did not dispute that Section 332(c)(7) provides for the invocation of local administrative procedures followed by federal judicial review. To the contrary, it acknowledged that 47 U.S.C. § 332(c)(7)(B)(v) expressly provides private judicial remedies "through which a plaintiff can redress [Communications Act] violations" in federal court. Pet. App. 5a-6a. But the Ninth Circuit held that Section 332(c)(7)(B)(v) is not "remedial" within the meaning of *Sea Clammers* because, according to that court, it "does not provide for any type of relief." Pet. App. 7a, 8a; see *id.* at 7a (Act "contains no

remedies at all."); *id.* at 8a (The "provisions are not remedial."); *id.* at 9a ("no remedial provisions"); *ibid.* ("[T]he statute grants no remedies beyond procedural rights."). Deeming the cause of action for "expedited judicial review" to be "hollow," the Ninth Circuit declared that "an expedited decision does nothing to remedy a [Communications Act] violation in itself." *Id.* at 8a-9a; Br. in Opp. 17.

The assertion that Section 332(c)(7)(B)(v) creates a federal private cause of action, but affords successful plaintiffs "no remedies at all," borders on the absurd. A statutory cause of action that does not permit courts to impose remedies would be non-justiciable; federal courts have no authority to issue advisory opinions without relief that alters the legal relationship of the parties. Congress, moreover, designed the cause of action in Section 332(c)(7)(B)(v) to "provide[] a mechanism for *judicial relief*." H.R. Conf. Rep. No. 458, *supra*, at 208 (emphasis added).

To be sure, Section 332(c)(7)(B)(v) does not enumerate the available remedies. As this Court explained in *Franklin* v. *Gwinnett County Public Schools*, however, federal courts adjudicating claims under statutes that create a cause of action, but are silent about remedies, are presumed to "have the power to award any *appropriate* relief." 503 U.S. 60, 70-71 (1992) (emphasis added); see *Nextel*, 286 F.3d at 695 n.6. In *Barnes* v. *Gorman*, 536 U.S. 181 (2002), this Court explained that "appropriate" relief under *Franklin* includes the "forms of relief traditionally available" in the particular type of suit at issue. *Id.* at 187; see *ibid.* (looking to breach-of-contract remedies to determine the scope of relief under Spending Clause provisions of Title VI).

In the context of judicial review of zoning disputes, the traditionally available and thus "appropriate" relief has long been equitable or specific relief, such as an injunction requiring the defendant to issue improperly withheld permits, or a remand for a new decision that complies with legal standards. As explained by the National League of

Cities, *et al.*, as Amici Curiae (Br. 13-15), and set forth below (see pp. 41-42, *infra*), virtually every State provides that relief (but not damages) on review of zoning decisions. Consistent with that tradition, every other court to have considered the matter has concluded that 47 U.S.C. § 332(c)(7)(B)(v) authorizes injunctive relief. *Oyster Bay*, 166 F.3d at 497 (one "appropriate remedy is injunctive relief in the form of an order to issue the relevant permits"); *National Tower, LLC* v. *Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 22 (1st Cir. 2002) ("appropriate remedy" is generally "an injunction" or "a remand, depending on the nature of the board's decision and the circumstances of the case"); *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1221-1222 (11th Cir. 2002) ("[A]n injunction (or other equitable relief) in the form of an order to issue the relevant permits is a proper form of relief."); *Nextel*, 286 F.3d at 695 & n.6 (citing cases). Indeed, the district court ordered precisely that relief here. Pet. App. 13a-15a.[12]

[12] For similar reasons, Section 332(c)(7) is not properly read as providing damages (although the Court need not resolve the issue here). Damages are not a "traditionally available" and thus an "appropriate" form of relief on review of zoning decisions. See pp. 41-45, *infra*; Br. Nat'l League of Cities, *et al.*, 15-16; Br. Local Gov't Amici, *et al.*, 21-23. The FCC—to which this Court traditionally defers—has reached that conclusion with respect to the portion of Section 332(c)(7) it administers. Section 332(c)(7)(B)(iv) gives persons aggrieved by the improper consideration of the environmental effects of radio frequency emissions the option of seeking relief directly from the FCC, and the FCC has interpreted that provision as providing for *declaratory* relief. See p. 5, *supra*. Given that Congress gave certain plaintiffs the choice between federal administrative and judicial relief, it would be anomalous to conclude that Congress provided the sweetener of damages only for the latter. Congress, in any event, envisioned Section 332(c)(7) as providing an "appeal" to federal court, see H.R. Conf. Rep. 458, *supra*, at 209, and appellate courts typically affirm, reverse, or vacate improper decisions but do not award damages. Interpreting Section 332(c)(7) to provide damages would also run afoul of Section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 (note), which directs that "this Act * * * shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Damages awards under federal law would have to pre-empt (and thus impair and supersede) the laws of many jurisdictions, including California, which immunize local governments from monetary liability for their zoning decisions. See pp. 44-45, *infra*. Finally, a damages remedy for ordinary zoning errors would represent a departure from prevailing practice, a departure that should not be presumed in this traditional area of state and local concern. See pp. 41-44, *infra*.

There is nothing "hollow" about those traditional remedies. They have long provided prompt and effective review and revision of zoning and land-use decisions. They likewise have proved effective in the context of the Administrative Procedure Act, which provides similar (and potentially more limited) specific relief from unlawful or erroneous agency decisions. See 5 U.S.C. § 704. Indeed, as *National Tower*, 297 F.3d at 22, *Oyster Bay*, 166 F.3d at 497, *Preferred Sites*, 296 F.3d at 1221-1222, and *Nextel*, 286 F.3d at 695 & n.6, make clear, the federal courts that "hear and decide" cases under Section 332(c)(7)(B)(v) have authority to order the issuance of *the very thing the claimant sought* in the first instance—a permit to build the disputed antenna structure. That relief is "quick and complete." *City of Chicopee*, 16 F. Supp. 2d at 123.

2. *The Ninth Circuit's Effort To Fill Perceived Gaps Is Inconsistent With* Sea Clammers

At the same time the Ninth Circuit declared that Section 332(c)(7)(B)(v) provides no remedies at all, it also held that limits on the *express* private cause of action provided by the Communications Act evinced Congress's intent to permit resort to the more expansive remedial provisions of Section 1983. "[T]he lack of any damages" under the Communications Act, the Ninth Circuit stated, is evidence "that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." Pet. App. 7a. That strained reasoning

cannot be reconciled with *Sea Clammers*. The statutes in *Sea Clammers* did not provide for damages. 453 U.S. at 14, 17; Pet. App. 7a-8a. Yet this Court held that Section 1983 remedies were unavailable nonetheless.

The Ninth Circuit's dismissal of the 30-day limitations period required by Section 332(c)(7)(B)(v)—because it "imposes a burden on an aggrieved plaintiff, not a benefit"—is similarly wanting. *Id.* at 8a. Like the Ninth Circuit's treatment of damages, it turns *Sea Clammers* and its progeny on their heads. Those cases recognize that Congress's decision to impose limits on express statutory remedies, far from evidencing an intent to provide the withheld relief under Section 1983, ordinarily precludes efforts to circumvent such limits through resort to Section 1983:

> [W]hen "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."

453 U.S. at 20 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)); see *Novotny*, 442 U.S. at 376 (Title VII violations cannot be asserted under 42 U.S.C. § 1985 because, among other things, the otherwise "short and precise time limitations of Title VII would be grossly altered").

Sea Clammers and its progeny support the "proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of Section 1983." *Smith* v. *Robinson*, 468 U.S. at 1003. Under the Ninth Circuit's inverted logic, Congress's decision *not* to provide a damages remedy in an underlying statute evidences Congress's intent to provide *both* damages and attorney's fees under Section 1983.

II. Congress Did Not Intend To Displace Traditional State Authority With Section 1983 Damages and Section 1988 Fees

The Ninth Circuit's decision is also difficult to reconcile with traditional tools of statutory construction. Zoning and land-use decisions are matters "particularly within the province of state and local" government. *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975). The attachment of Section 1983's remedial apparatus to Section 332(c)(7)'s carefully crafted review mechanism would be inconsistent with and upset the longstanding rules that govern zoning and land-use decisions. It would be contrary to Congress's express desire not to impair the functioning of state laws. And it would be at odds with the legislative history of Section 332(c)(7), which evinces no intent to impose new liabilities on state and local governments for their exercise of traditional zoning authority.

A. Imposing The Remedial Apparatus of Section 1983 Is Inconsistent With The Traditional Zoning Regimes Congress Preserved And Emulated

The interpretation of any statute begins with "the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[W]e do not lightly assume that Congress has intended to depart from established principles."); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 212 (1978) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). That presumption is particularly weighty where, as here, the Court is "determining the breadth of a federal statute that impinges upon or pre-empts the State's traditional powers" in an area such as land-use and zoning. *Oregon Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 345 (1994);

Gonzaga, 536 U.S. at 286 n.5 (rejecting the "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials" by authorizing Section 1983 damages).

In the context of judicial review of zoning and land-use decisions, the nearly universal "past practice" is to provide specific relief but not damages and attorney's fee awards. Virtually every State provides judicial review of such decisions, subject to a short limitations period (42 jurisdictions require that a challenge be brought in 30 days or fewer, and none allows more than 90 days); virtually every State has broad standing rules that allow suit by individuals "adversely affected" or "aggrieved" by a "final" agency action or decision; and virtually every State applies a deferential "substantial evidence" test. See Br. Nat'l League of Cities, *et al.*, 8-17; App., *infra*, 26a-41a (collecting state zoning and permit review laws). Critically, virtually every State limits judicial remedies to specific relief, such as an order affirming, reversing, vacating, remanding, or modifying the decision under review. See Br. Nat'l League of Cities, *et al.*, 14-17; App., *infra*, 25a-41a; App., *infra*, 15a-25a (immunity laws). They do not award damages—much less attorney's fees—against a locality for ordinary errors in the application of zoning laws, and barely a handful afford such relief even in extraordinary cases.

Nothing in Section 332(c)(7) evinces an intent to depart from that practice by introducing unprecedented liability for attorney's fees and damages for virtually every mistaken zoning decision. To the contrary, Section 332(c)(7) reflects a concerted effort to preserve and emulate traditional procedures. It does not merely rely on state and local administrative proceedings in the first instance. The mechanism for judicial review it furnishes expressly echoes the typical characteristics of state review mechanisms: It provides for review of "final" administrative action or

failure to act. 47 U.S.C. § 332(c)(7)(B)(v). It imposes a short limitations period, opting for the 30-day period used by most States. *Ibid.* It affords standing to any person who is adversely affected. *Ibid.* It employs the substantial evidence test. 47 U.S.C. § 332(c)(7) (B)(iii); H.R. Conf. Rep. No. 458, *supra*, at 208. And it envisions that judicial review will function as an "appeal"—a process that, like traditional state review, ordinarily results in the affirmance, vacatur, or revision of (but not the imposition of damages because of) the judgment below. See H.R. Conf. Rep. 458, *supra*, at 209 ("The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a state court of competent jurisdiction, at the option of the party making the appeal * * * .").

Indeed, in providing for judicial review, Section 332(c)(7)(B)(v) directs courts to "hear and decide" cases. That phrase is used in virtually every state zoning act to describe the function of zoning boards of adjustment, which serve an appellate function and provide specific (but not monetary) relief from the operation of otherwise potentially rigid zoning laws.[13] Congress's obvious solicitude for existing

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[13] See, *e.g.*, Ala. Code § 11-19-19 (1989) (board of adjustment may "hear and decide appeals" and "hear and decide on requests for special exceptions"); Ariz. Rev. Stat. Ann. § 9-462.06 (West 1996) ("hear and decide appeals"); Colo. Rev. Stat. Ann. § 30-28-118 (West 2002) ("hear and decide appeals" and "hear and decide * * * requests for special exceptions"); Conn. Gen. Stat. Ann. § 8-6 (West 2001) ("hear and decide appeals" and "requests for special exceptions"); 55 Ill. Comp. Stat. Ann. 5/5-12011 (West 1993) ("hear and decide appeals" and "hear and decide all matters referred to it"); Mass. Gen. Laws Ann. ch. 40A, § 14 (West 2004) (board of appeals shall "hear and decide appeals"; "hear and decide applications for special permits"; "hear and decide petitions for variances"); N.Y. Town Law § 267-a (McKinney 2004) (jurisdiction of the board is "appellate only" and is "limited to hearing and deciding appeals"); Pa. Stat. Ann. tit.

state procedures cannot be reconciled with the "radical departure" of imposing damages and attorney's fees for ordinary (if mistaken) zoning and land-use decisions.

B. Damages And Fees Liability Is Inconsistent With Section 601(c)(1) Of The 1996 Act

The text of the Communications Act erases any doubt regarding the availability of damages and fees under Section 1983. As noted above, Section 332(c)(7)'s title alone, "Preservation of local zoning authority," is virtually dispositive. It would defy Section 332(c)(7)'s clear instruction—and basic common sense—to conclude that state and local zoning authority is somehow "preserved" by subjecting those decisionmakers to liability that is completely foreign to traditional zoning schemes.

That result, moreover, would be inconsistent with the savings provision in Section 601(c)(1) of the 1996 Act, 110 Stat. 143, 47 U.S.C. § 152 (note). Under the title "No implied effect," that provision directs that "this Act and the amendments made by this Act shall not be construed to modify, *impair*, or supersede Federal, *State, or local law* unless expressly so provided in such Act or amendments." *Ibid.* (emphasis added). A majority of States have by statute or decision immunized themselves and their municipalities from damages arising from the exercise of zoning and land-use authority. See App., *infra*, 15a-25a (listing state laws). For example, Section 818.4 of the California Government Code declares that a "public entity is not liable for an injury caused by the * * * denial * * * or by the failure or refusal to issue * * * any permit, license, certificate, approval, order, or similar authorization," and the California Supreme Court has held that the statutory immunity prevails over laws that would otherwise impose monetary liability, *State of California* v. *Superior Court*,

53, § 14759 (West 1998) ("[t]o hear and decide appeals" and "[t]o hear and decide special exceptions").

524 P.2d 1281, 1286-1287 (Cal. 1974). Reading the Communications Act to expand Section 1983's reach to impose that sort of monetary liability—and preempt otherwise applicable state immunity laws—in this area of traditional state regulation would unmistakably "impair" such state immunity laws.

Congress, of course, has the "undisputed power * * * to override" state-law immunities "when subjecting a municipality to suit under a federal cause of action." *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003). And Congress has exercised that preemptive authority through Section 1983. See *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted."). But Congress directed that the Communications Act should not be read as exercising the power to "impair * * * State or local law" *unless* the Act itself "expressly so provides." Reading Section 332(c)(7) to *expand* Section 1983's preemption of otherwise applicable state immunity laws—preventing those state laws from achieving their purpose of protecting localities from liability for the exercise of traditional zoning and land-use authority—certainly "impair[s]" them. See *Humana, Inc.* v. *Forsyth*, 525 U.S. 299, 309-310 (1999) (defining "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner" (quoting Black's Law Dictionary 752 (6th ed. 1990)). Nothing in the Communications Act provides for that result expressly, and Section 601 precludes the Act from being read to yield that result by implication.

C. Section 332(c)(7)'s Origins Belie Any Intent To Impose Liability For Damages And Fees Under Sections 1983 and 1988

The evolution of the text that ultimately became Section 332(c)(7) likewise belies the contention that Congress intended to impose damages and fee awards under Sections

1983 and 1988. As originally drafted, the 1996 Act would have vested the FCC with responsibility and authority to preempt state and local zoning law regarding wireless communications tower siting. See pp. 2-3, *supra*. Nothing in the legislative record suggests that such agency preemption would have resulted in the imposition of Section 1983 liability. To the contrary, the Congressional Budget Office "pay-as-you-go cost estimates" associated with the legislation suggest the opposite.[14] It would be a perversion of Congress's intent to argue that Congress, by amending proposed legislation to "preserve" the authority of state and local governments (subject to judicial review under Section 332(c)(7)(B)(v)), intended to impose such costs. Indeed, Congress appears to have shifted from FCC enforcement to judicial review—at least in the context of 47 U.S.C. § 253—to avoid imposing financial burdens, such as the cost of traveling to Washington, D.C., to defend actions before the FCC, on small and rural municipalities.[15] To read the resulting statute to require those local governments to pay damages under Section 1983 and fees under Section 1988 would impose the very sort of financial burdens that Congress sought to avoid.

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[14] While those estimates address other potential costs to state and local governments, they nowhere suggest any financial impact from potential damages and fee awards under Section 1983. H.R. Conf. Rep. No. 204, 104th Cong., 2d Sess. 70-71 (1996); Cong. Budget Office, *Cost Estimate for S. 652, Telecommunications Competition and Deregulation Act of 1995*, at 8-9 (May 5, 1995).

[15] See Br. Local Gov't Amici 29-30; 141 Cong. Rec. 15,591 (1995) (Sen. Feinstein) (observing that the "preemption provision will force small cities to defend themselves in Washington, and many will be just unable to afford the cost"); 141 Cong. Rec. 15,984 (1995) (Sen. Feinstein) (noting that most cities lack the financial wherewithal to litigate before a federal agency located in Washington, D.C.).

III. The 1996 Act's Savings Clause Does Not Establish Congress's Intent To Permit Enforcement Through Section 1983

Alternatively, the Ninth Circuit held that Section 601(c)(1) of the 1996 Act, 47 U.S.C. § 152 (note), supports Section 1983 liability. That provision declares that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." As explained above, precisely the opposite is true: That provision forecloses the imposition of monetary liability—and the concomitant preemption of state municipal immunity laws—for Communications Act violations. See pp. 44-45, *supra*. The Ninth Circuit's reading of Section 601(c)(1), in any event, cannot be reconciled with this Court's construction of virtually indistinguishable savings clauses in *Sea Clammers*. Nor can it be reconciled with the most sensible reading of Section 601(c)(1)'s text.

A. The Ninth Circuit's Reading Of Section 601(c)(1) Is Foreclosed By *Sea Clammers*

In *Sea Clammers*, this Court addressed whether the savings clauses found in the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), had the effect of permitting those statutes to be enforced through Section 1983. The savings clauses declared that the FWPCA and MPRSA should not be interpreted to "restrict any right which any person * * * may have under any statute or common law *to seek enforcement of any * * * standard or limitation or to seek any other relief* (including relief against the Administrator * * * or a State agency)." 453 U.S. at 7 n.10 & n.11 (quoting 33 U.S.C. §§ 1365(e), 1415(g)(5)) (emphasis added). Rejecting the claim that the clauses authorized Section 1983 suits for violations of the FWPCA or MPRSA, the Court explained that the clauses were designed to preserve the right to enforce the substantive requirements created by *other* statutes, not to

create alternative means of enforcing the FWPCA and MPRSA themselves through statutes like Section 1983. 453 U.S. at 20 n.31 ("[T]he savings clauses do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted.").

Although recognizing the similarity between the savings clauses at issue in *Sea Clammers* and Section 601(c)(1), the Ninth Circuit urged that Section 601(c)(1) of the Communications Act "sweeps more broadly" than the savings clauses in *Sea Clammers*. The Ninth Circuit observed that, whereas Section 601(c)(1) states that the 1996 Act shall not be construed so as to "modify, impair, or supersede Federal, State, or local law," the savings clauses at issue in *Sea Clammers* provided that the statutes there should not be read to "restrict any right which any person * * * may have under any statute or common law to seek enforcement * * * or to seek any other relief." Pet. App. 11a. "The [1996 Act's] general savings clause forbids the impairment of any federal 'law'—not the impairment of any 'right,'" the Ninth Circuit declared. *Ibid.*

It is hard to see how, given the language of the savings clauses in *Sea Clammers*, that purported distinction can make a meaningful difference. It is true that Section 1983 does not itself create rights; it provides a mechanism for *enforcing* rights created by other laws. But the savings clauses in *Sea Clammers* did not preserve "rights"; they preserved the right to "*seek enforcement*" or "*any other relief,*" precisely what Section 1983 would provide. If the specific preservation of the right to "seek enforcement" or "any other relief" in *Sea Clammers* did not evince Congress's intent to allow enforcement of the FWPCA and MPRSA or relief for violations of those statutes under Section 1983, then the general bar against "impair[ment]" of federal "laws" found in Section 601(c)(1) does not either.

B. The Ninth Circuit's Reasoning Is Unsound

Even apart from its inconsistency with *Sea Clammers*, the Ninth Circuit's reading of Section 601(c)(1) is fundamentally flawed. The Ninth Circuit assumed the very conclusion—the availability of Section 1983 relief—that it set out to prove. The Ninth Circuit essentially reasoned that, unless Section 332(c)(7)'s limits upon enactment became enforceable through Section 1983, then the Communications Act and Section 332(c)(7) would somehow "impair" Section 1983. But violations of Section 332(c)(7) were not enforceable under Section 1983 before the 1996 Act became law (Section 332(c)(7) did not exist). Likewise, violations of Section 332(c)(7) still cannot be enforced through Section 1983 now that the 1996 Act is law. That does not mean that Congress, in passing the 1996 Act, "impair[ed]" Section 1983. It means that the 1996 Act left the violations that can be asserted under Section 1983 *unchanged*. As the Third Circuit observed in *Nextel*:

> [The] holding * * * that the relevant provision of the [1996 Act] does not create a right enforceable under § 1983 * * * does not mean that the [1996 Act] in any way modified, impaired, or superceded § 1983. [The court need not] hold that enactment of the [1996 Act] had any effect on § 1983; [the court need only] hold that the [1996 Act] itself did not create a right that can be asserted under § 1983 in lieu of the [1996 Act's] own remedial scheme.

286 F.3d at 696. "A 'savings clause' can only save what already exists." *Verizon Maryland, Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002). As this Court observed when rejecting efforts to assert Title VII claims through Section 1985(3) in *Novotny*: There is no "question of implied repeal. The right Novotny claims under § 704(a) did not even arguably exist before passage of Title VII. The only question here, therefore, is whether the rights created by Title VII may be asserted within the

remedial framework of § 1985(3)." 442 U.S. at 376-377. The Ninth Circuit simply confused Congress's refusal *to expand* the category of claims that can be asserted under Section 1983 with an "impairment" of that statute.

In *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004), this Court all but rejected the Ninth Circuit's reasoning when construing the antitrust-specific savings clause in Section 601(b)(1) of the 1996 Act. That provision declared that "nothing in this Act or the amendments made by this Act shall be construed *to modify, impair, or supersede* the applicability of any of the antitrust laws." The Court concluded that Section 601(b)(1) evinces an intent to leave antitrust law essentially unchanged, holding that Section 601(b)(1) both "preserves those claims that satisfy established" or "preexisting" "antitrust standards," *id.* at 878, and forecloses a construction of the statute that would create "new claims that go beyond existing antitrust standards," *ibid.* In this case, Section 601(c)(1) evinces a similar intent—to leave the scope of pre-existing federal, state, and local laws undisturbed absent an express contrary directive in the Communications Act itself. The Ninth Circuit's invocation of Section 601(c)(1) as mandating a radical departure from previously settled principles is thus wholly at odds with Section 601(c)(1)'s basic purpose.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

FEDERAL STATUTORY PROVISIONS

1. The Communications Act of 1934, as amended by Pub. L. No. 97-259, § 120(a), 96 Stat. 1096, by Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 1093, and by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 151, codified as 47 U.S.C. § 332, provides in relevant part:

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required

to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications

services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission

completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such sub-paragraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Com-

mission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

2. Section 601 of the Telecommunications Act of 1996, 110 Stat. 143, codified as 47 U.S.C. 152 note, provides in relevant part:

Applicability of Consent Decrees and Other Law

* * * * *

(b) Antitrust laws.—

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

* * * * *

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

3. Section 1983 of Title 42 of the United States Code provides, in relevant part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Section 1988 of Title 42 of the United States Code provides, in relevant part:

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs,

including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX B

STATE DAMAGES IMMUNITY LAWS FOR PERMIT DENIALS

Alaska Stat. § 09.65.070(d) (LexisNexis 2002) ("An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim * * * is based upon the grant, issuance, refusal, suspension, delay, or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning.").

Ark. Code Ann. § 21-9-301 (LexisNexis 2004) ("[A]ll counties, municipal corporations, * * * and all other political subdivisions of the state and any of their boards, commissions, [or] agencies, * * * shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.").

Cal. Gov. Code § 818.4 (West 1995 & Supp. 2004) ("A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit * * * where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."); *State of California* v. *Superior Court*, 524 P.2d 1281, 1286-1287 (Cal. 1974) ("general provisions" providing damages "were not intended to prevail over the specific immunities granted by sections 818.4 and 821.2 of the Government Code.").

Colo. Rev. Stat. Ann. § 24-10-106 (West 2001 & Supp. 2003), *as amended*, Colo. Legis. Serv. Ch. 280 (West 2004) ("A public entity shall be immune from liability in all claims for injury which lie in tort * * * except as provided otherwise in this section."); *Sundheim* v. *Bd. of County Comm'rs of Douglas County*, 904 P.2d 1337, 1345 (Colo. App. 1995) ("An action for judicial review under C.R.C.P. 106(a)(4) is the exclusive remedy for contesting a zoning decision when

the entire zoning ordinance is not challenged and when record review of the county procedure provides an adequate remedy. * * * C.R.C.P. 106 does not provide for a remedy in damages."), *aff'd*, 926 P.2d 545 (Colo. 1996).

Conn. Gen. Stat. Ann. § 52-557n(b) (West 1991) ("[A] political subdivision of the state or any employee, officer or agent * * * shall not be liable for damages to person or property resulting from * * * the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, when such authority is a discretionary function by law, unless such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety.").

Del. Code Ann. tit. 10 § 4011(b) (1999) ("[A] governmental entity shall not be liable for any damage claim which results from * * * [t]he undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.").

Fla. Stat. Ann. § 768.28 (West 1997 & Supp. 2004) ("[T]he state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability in torts, but only to the extent specified in this act."); see *Paedae* v. *Escambia County*, 709 So. 2d 575, 577-78 (Fla. Dist. Ct. App. 1998) ("[T]here has never been and there is no present state tort liability imposed for peculiarly governmental functions such as permitting," including "the conduct or the functions of county commissioners or boards in the issuance of or refusal to issue licenses and permits," even "where the city acted in an arbitrary and capricious manner."); *Trianon Park Condominium Assoc., Inc.* v. *City of Hialeah*, 468 So.2d 912 (Fla. 1985) (sovereign immunity bars suit because "commissions, boards, city councils, and executive officers, * * * by their issuance of, or refusal to issue, licenses,

permits, [and] variances, * * * are acting pursuant to basic governmental functions").

Ga. Code Ann. § 36-33-1 (2000) ("Except as provided in this Code section * * * there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages.")

Haw. Rev. Stat. § 662-15 (2002 & Supp. 2003) (State Tort Liability Act does not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused."); see *Allen* v. *City and County of Honolulu*, 571 P.2d 328, 331 (Haw. 1977) ("to permit damages" in "zoning disputes" is "not only unprecedented but would also be unsound policy" as it would "have a detrimental effect on the community's control of the allocation of its resources.").

Idaho Code § 6-904B (Michie 1998 & Supp. 2003) ("A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct * * * shall not be liable for any claim which * * * [a]rises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.").

745 Ill. Comp. Stat. Ann. 10/2-104 (West 2002) ("A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit * * * where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.").

Ind. Code Ann. 34-13-3-3 (LexisNexis 1998 & Supp. 2003) ("A governmental entity * * * is not liable if a loss

results from the * * * issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit * * * where the authority is discretionary under the law.").

Kan. Stat. Ann. § 75-6104 (1997) ("A governmental entity * * * shall not be liable for damages resulting from * * * any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."); see *Weeks* v. *City of Bonner Springs*, 518 P.2d 427, 436 (Kan. 1974) ("granting or denial of [an occupancy] permit falls within the discretionary powers of the administrative tribunal").

Ky. Rev. Stat. § 65.2003 (Michie 1993 & Supp. 2003) ("[A] local government shall not be liable for injuries or losses resulting from * * * [a]ny claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include * * * [t]he issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.").

La. Rev. Stat. Ann. 9:2798.1(B) (West 1997 & Supp. 2004) ("Liability shall not be imposed on public entities * * * based upon the exercise or performance or the failure to exercise or perform their * * * discretionary acts when such acts are within the course and scope of their lawful powers and duties."); see *Inv. Mgmt. Servs., Inc.* v. *Village of Folsom*, 808 So.2d 597, 607 (La. App. 2001) ("[T]he issuance of a building permit is * * * a discretionary act").

Me. Rev. Stat. Ann. tit. § 8104-B (West 2003) ("[A] governmental entity is not liable for any claim which results from * * * [u]ndertaking or failing to undertake any judicial

or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.").

Md. Code Ann., Cts. & Jud. Proc. § 5-503(e) (2003) ("A local government may assert on its own behalf any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by its employee for whose tortious act or omission the claim against the local government is premised."); *Baltimore Police Dep't.* v. *Cherkes*, 780 A.2d 410, 431 (Md. App. 2001) (Local Government Tort Claims Act "neither authorizes a direct action against a local government nor waives the common law governmental immunity of an entity designated as a local government.").

Mass. Gen. Laws Ann. ch. 258 § 10 (West 2004) (provisions waiving immunity from liability "shall not apply to * * * any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.").

Mich. Comp. Laws Ann. § 691.1407 (West 2000 & Supp. 2004) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if * * * engaged in the exercise or discharge of a governmental function."); see *Louis J. Eyde Ltd. Family P'ship* v. *Charter Township of Meridian*, No. 248312, 2004 WL 1366936, at *3 (Mich. App. June 17, 2004) ("Clearly, [the zoning board's] action of deciding whether to grant a [special use permit] is a governmental function").

Minn. Stat. Ann. § 466.03 (West 2001 & Supp. 2004) (absent statutory waiver, "every municipality shall be immune from liability * * * [for] [a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is

abused."); see *Barton Contracting Co.* v. *City of Afton*, 268 N.W.2d 712, 717 (Minn. 1978).

Miss. Code Ann. § 11-46-3 (LexisNexis 2002) ("[T]he 'state' and its 'political subdivisions,' * * * are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or equity on account of any wrongful or tortious act or omission * * * notwithstanding that any such act [or] omission * * * constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature.").

Neb. Rev. Stat. § 13-910 (2004), *as amended*, Neb. Legis. 560 (March 19, 2004) (political subdivisions retain immunity for "[a]ny claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order.").

Nev. Rev. Stat. Ann. § 278.0233 (LexisNexis 2002) (permitting property owners to "bring an action against the agency to recover actual damages caused by * * * [a]ny final action, decision or order of the agency which imposes requirements, limitations or conditions upon the use of the property in excess of those authorized by ordinances" if such was "arbitrary or capricious" or "unlawful or exceeds lawful authority," but barring such actions "[w]here the agency did not know, or reasonably could not have known, that its action, decision or order was unlawful or in excess of its authority."); see Nev. Rev. Stat. Ann. § 278.0237 (LexisNexis 2002) ("The court may award reasonable attorney's fees, court costs and interest to the prevailing party in an action brought under NRS 278.0233.").

N.J. Stat. Ann. § 59:2-5 (West 1992) ("A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to

issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.").

N.M. Stat. Ann. § 41-4-4 (West 2003) ("A governmental entity * * * [is] granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act and by Sections 41-4-5 through 41-4-12 NMSA 1978.").

Allan and Allan Arts Ltd. v. *Rosenblum*, 615 N.Y.S.2d 410, 413 (App. Div. 1994) (the "Board's determination" to deny "an application for a variance" was "'discretionary and quasi-judicial in nature,' thus immunizing the members of the Board from suit.") (quoting *Moundroukas v. Foley*, 472 N.Y.S.2d 32 (App. Div. 1984)).

Northfield Dev. Co. v. *City of Burlington*, 523 S.E.2d 743, 749-750 (N.C. Ct. App. 2000) ("Individuals, including county commissioners and city council members, are entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function," including decisions "to grant or deny variances or special use permits."); *Law Bldg. of Asheboro* v. *City of Asheboro*, 423 S.E.2d 93, 95 (N.C. Ct. App. 1992) ("We know of no authority or precedent for recognizing or allowing a civil action in damages for alleged unlawful denial of a building permit by a municipality."); *Stephenson v. Town of Garner*, 524 S.E.2d 608 (N.C. Ct. App. 2000) (suit properly dismissed because "the aldermen may claim legislative immunity to suits arising out of their denial of Sprint's CUP petition").

N.D. Cent. Code § 32-12.1-03(3) (1996 & Supp. 2003) ("[A] political subdivision or a political subdivision employee is not liable for any claim that results from * * * [t]he decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant

with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.").

Okla. Stat. Ann. tit. 51 § 155 (West 2000 & Supp. 2005), *as amended*, Okla. Legis. 381 (2004) ("The state or a political subdivision shall not be liable if a loss or claim results from * * * the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.").

Or. Rev. Stat. Ann. § 30.265(3) (2003) ("Every public body and its officers, employees and agents acting within the scope of their employment or duties * * * are immune from liability for * * * [a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."); see *Culver* v. *Sheets*, 509 P.2d 1221, 1225 (Or. Ct. App. 1973).

42 Pa. Cons. Stat. Ann. § 8541 (West 1998 & Supp. 2004) ("Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."); see 42 Pa. Cons. Stat. Ann. § 8542 (West 1998 & Supp. 2004).

R.I. Gen. Laws § 9-31-1 (1997) (waiving immunity for the State of "Rhode Island and any political subdivision thereof" to liability "in all actions of tort in the same manner as a private individual or corporation" but limiting recovery to "the monetary limitations * * * set forth in this chapter.").

S.C. Code Ann. § 15-78-60 (West 1997 & Supp. 2003) (governmental entities "not liable for a loss resulting from * * * the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, regis-

tration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.").

S.D. Codified Laws § 21-32A-3 (Michie 1987 & Supp. 2003) ("Except insofar as a public entity participates in a risk sharing pool or insurance is purchased pursuant to § 21-32A-1, any public entity is immune from liability for damages whether the function in which it is involved is governmental or proprietary.").

Tenn. Code Ann. § 29-20-201 (LexisNexis 2000 & Supp. 2003) ("Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from * * * the exercise and discharge of any of their functions," because "[c]omplete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies."); Tenn. Code Ann. § 29-20-205 (LexisNexis 2000 & Supp. 2003) (waiving immunity "for injury proximately caused by a negligent act or omission of any employee * * * except if the injury arises out of * * * the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization.").

State v. *City of Galveston*, No. 01-03-00557-CV, 2004 WL 2066448, at *11-12 (Tex. Ct. App. Sept. 10, 2004) ("Under Texas law, 'a city is immune from liability for its governmental actions,' unless the Legislature has expressly waived governmental immunity;" only enacted waiver is for damages arising from an employee's "operation or use of a motor-driven vehicle or motor-driven equipment.").

Utah Code Ann. §§ 63-30d-301(4), (5) (1997 & Supp. 2004) (immunity is waived "as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment," but waiver does not apply "if the injury arises out of, in connection

with, or results from * * * the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization.").

Graham v. *Town of Duxbury*, 787 A.2d 1229, 1232 (Vt. 2001) ("Municipal sovereign immunity is a common-law doctrine which dates back to the mid-1800s in Vermont. It protects municipalities from tort liability in cases where the municipality fulfills a governmental rather than a proprietary function.") (citations omitted); see *Maurice Callahan & Sons, Inc.* v. *Cooley*, 220 A.2d 467, 469 (Vt. 1966) ("[I]n issuing a permit under a zoning ordinance, municipal officials are discharging a governmental function.").

Wash. Rev. Code Ann. § 64.40.020(1), (2) (West 1994) ("Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: Provided, that the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority. The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.").

W. Va. Code Ann. § 29-12A-5 (LexisNexis 2001 & Supp. 2004) ("A political subdivision is immune from liability if a loss or claim results from * * * the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.").

Wis. Stat. Ann. § 893.80(4) (1997 & Supp. 2003) ("No suit may be brought against any * * * political corporation,

governmental subdivision or any agency thereof * * * for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."); see *Weinstein* v. *Yahara Builders*, 463 N.W.2d 882, 1990 WL 198172, at *1 (Wis. Ct. App. Oct. 23, 1990) (immunity for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions" encompasses "[t]he power to issue permits," a "quasi-judicial function.").

Wyo. Stat. Ann. § 1-39-104 (LexisNexis 2003) ("A governmental entity * * * [is] granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112 and limited by W.S. 1-39- 121."); see Wyo. Stat. Ann. §§ 1-29-105 to 1-39-112 (LexisNexis 2003) (no exception for issuance or denial of permits).

APPENDIX C

STATE ZONING DECISION REVIEW LAWS

Ala. Code § 11-52-81 (1994) ("Any party aggrieved by any final judgment or decision of such board of zoning adjustment may within 15 days thereafter appeal therefrom to the circuit court by filing with such board a written notice of appeal * * * ."); *id.* § 11-52-80(d) (Board of adjustment may "reverse or affirm, wholly or partly, or * * * modify the order, requirement, decision or determination * * * ."); *Asam* v. *Tuscaloosa*, 599 So.2d 1192, 1194 (Ala. Civ. App. 1992) ("On an appeal * * * the trial court is limited to the powers given to the board of adjustment under Ala. Code 1975, § 11-52-80(d).").

Alaska Stat. § 29.40.060 (LexisNexis 2002) ("The assembly shall provide by ordinance for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court. An appeal to the superior court under this section is an administrative appeal heard solely on the record established by the hearing officer, board of adjustment, or other body."); *South Anchorage Concerned Coalition, Inc.* v. *Coffey*, 862 P.2d 168, 173 (Alaska 1993) ("[Appeals] shall be heard solely on the record established before the municipal bodies and the zoning body's decision shall not be reversed if, in the light of the whole record, [it is] supported by substantial evidence.").

Ariz. Rev. Stat. Ann. § 11-808 (West 2001) ("[J]udicial review of the final decisions of the board of supervisors shall be pursuant to [§ 12-901 et seq.]"); *id.* § 12-904(A) ("An action to review a final administrative decision shall be commenced by filing a complaint within thirty-five days * * * ."); Ariz. Rev. Stat. Ann. § 12-910(A) (West 2003) ("An action to review a final administrative decision shall be heard and determined with convenient speed."); *id.* § 12-

911(A)(5) ("The court may affirm, reverse, modify, or vacate and remand the agency action.").

Ark. Code Ann. § 14-56-425 (Michie 1998) ("[A]ppeals from final action taken by the administrative and quasi-judicial agencies in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from the decisions of inferior courts * * * ."); Ark. R. App. P. 4(a) ("[A] notice of appeal shall be filed within thirty (30) days from the entry of the judgment * * * .").

Cal. Gov't Code § 65009(b)(1) (West 1997 & Supp. 2004) ("[A]n action or proceeding [may be brought] to attack, review, set aside, void, or annul a finding, determination or decision of a public agency made pursuant to [Title 7, Div. 1, Ch. 1, California's Planning and Zoning General Provisions]."); *id.* § 65009(c)(1)(E) ("[N]o action or proceeding shall be maintained * * * by any person unless the action or proceeding is commenced * * * within 90 days after the legislative body's decision * * * [t]o attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit."); see also Cal. Civ. Proc. § 1095 ("If judgment be given for the applicant, the applicant may recover damages which the applicant has sustained * * * or as may be determined by the court * * * , together with costs * * * ."); *State of California* v. *Superior Court*, 524 P.2d 1281, 1286-1287 (Cal. 1974) ("It seems clear that sections 818.4 and 821.2 of the Government Code [conferring immunity from damages upon municipalities] were intended by the Legislature to qualify section 1095 of the Code of Civil Procedure * * * . The general provisions of section 1095 were not intended to prevail over the specific immunities granted by sections 818.4 and 821.2 * * * .").

Colo. R. Civ. P. 106(a)(4)(I) (West 1986) ("Review shall be limited to whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."); Colo. R. Civ. P. 106(b) ("[A] complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer."); *Sundheim* v. *Bd. of County Comm'rs of Douglas County*, 904 P.2d 1337, 1345 (Colo. App. 1995) ("An action for judicial review under C.R.C.P. 106(a)(4) is the exclusive remedy for contesting a zoning decision when the entire zoning ordinance is not challenged and when record review of the county procedure provides an adequate remedy * * *. C.R.C.P. 106 does not provide for a remedy in damages."); see also 5A Colo. Prac., Handbook on Civil Litigation § 1520 (2003-2004 ed.) ("[D]amages are not available under Rule 106(a)(4), the section of this rule providing relief in the nature of certiorari and used to review administrative actions.").

Conn. Gen. Stat. Ann. § 8-8(b) (West 2001) ("[A]ny person aggrieved by any decision of a board, * * * may take an appeal to the superior court * * *. The appeal shall be commenced * * * within fifteen days."); *id.* § 8-8(l) (West 2001) ("The court * * * may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from.")

Del. Code Ann. tit. 22 § 328(a) (1997) ("Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment * * * may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the board within 30 days after the filing of the decision in the office of the board."); *id.* § 328(c) ("The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

D.C. Code Ann. § 2-510(a) (2001) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to judicial review thereof in accordance with this subchapter upon filing in the District Court of Appeals a written petition for review * * *. Upon the filing of a petition for review, the Court * * * shall have power to affirm, modify, or set aside the order or decision complained of, in whole or in part, and, if need be, remand the case for further proceedings, as justice may require."); D.C. R. App. Ct. 15(a)(2) ("[T]he petition for review must be filed within 30 days after notice is given.").

Fla. Stat. Ann. § 120.68 (West 2002 & Supp. 2004) ("Any party who is adversely affected by final agency action is entitled to judicial review * * *. All proceedings shall be instituted by filing a notice of appeal or petition for review within 30 days after the rendition of the order being appealed * * *. Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a special provision of this section, it shall affirm the agency's action.").

Beugnot v. *Coweta County*, 500 S.E.2d 28, 30 (Ga. App. 1998) ("A disappointed landowner travels to superior court by direct appeal, if the zoning ordinance so provides, or otherwise by mandamus.") (internal quotation marks omitted); *RCG Props., LLC* v. *City of Atlanta Bd. of Zoning Adjustment*, 579 S.E.2d 782, 788 (Ga. App. 2003) ("[T]he superior court must * * * decide whether the record contains evidence supporting the [board of zoning adjustment's] * * * decision * * * [and] must decide whether the [board] (1) acted beyond the scope of its discretionary powers; (2) abused its discretion; (3) or acted in an arbitrary or capricious manner.") (citations omitted).

Haw. Rev. Stat. § 91-14 (2003) ("Any person aggrieved by a final decision and order * * * is entitled to judicial review thereof under this chapter * * *." "Upon review of

the record the court may affirm the decision of the agency or remand the case with instructions * * * or it may reverse or modify the decision."); Haw. Legis. 202 (2004) ("[P]roceedings for review shall be instituted in the circuit court within thirty days after the * * * final decision and order of the agency * * * .").

Idaho Code § 67-6519 (Michie 2001 & Supp. 2003) ("An applicant denied a permit or aggrieved by a decision [of a governing board or zoning commission] may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review."); *id.* § 67-5279(2) ("If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.").

55 Ill. Comp. Stat. Ann. 5/5-12012 (West 1993) ("All final administrative decisions of the board of appeals hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law [735 Ill. Comp. Stat. 5/3-101 et seq.] * * * ."); 735 Ill. Comp. Stat. Ann. 5/3-103 (West 2003) ("Every action * * * shall be commenced by the filing of a complaint and the issuance of a summons within 35 days * * * ."); 73 Ill. Comp. Stat. Ann. 5-3/111 (West 1993) ("The Circuit Court has power * * * to affirm or reverse the decision in whole or in part, * * * to reverse and remand the decision in whole or in part, * * * or to remand for the purpose of taking additional evidence.").

Ind. Code Ann. § 36-7-4-1003 (LexisNexis 1999 & Supp. 2003) ("Each person aggrieved by a decision of the board of zoning appeals * * * may file with the circuit or superior court * * * a verified petition setting forth that the decision is illegal in whole or in part * * * . The person shall file the petition with the court within thirty (30) days."); Ind. Code Ann. § 36-7-4-1009 (LexisNexis 1999) ("[T]he court may reverse, affirm, or modify the decision of the board brought up for review.").

Iowa Code Ann. § 335.18 (2001) ("Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment * * * may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * * . Such petition shall be presented to the court within thirty days."); Iowa Code Ann. § 414.18 (1999) ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Kan. Stat. Ann. §§ 19-2962 (1995) ("Any person * * * dissatisfied with any order or determination of the board of zoning appeals or the board of county commissioners may bring an action in the district court * * * to determine the reasonableness of any such order or determination."); *id.* § 19-223 ("Any person who shall be aggrieved by any decision of the board of county commissioners may appeal from the decision of such board to the district court within thirty days."); *M.S.W., Inc.* v. *Bd. of Zoning Appeals of Marion County*, 24 P.3d 175, 180 (Kan. App. 2001) ("The district court's power [on appeal] is limited to determining (a) the lawfulness of the action taken, and (b) the reasonableness of such action.").

Ky. Rev. Stat. § 100.347 (Michie 1993 & Supp. 2003) ("Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court * * * . Such appeal shall be taken within thirty (30) days after the final action of the board."); *Fritz* v. *Lexington-Fayette Urban County Gov't*, 986 S.W.2d 456, 458-459 (Ky. App. 1998). ("[J]udicial review is limited to the question of whether the administrative decision was arbitrary.").

La. Rev. Stat. Ann. § 33:4727(E)(1) (West 2002) ("Any person or persons jointly or severally aggrieved by any decision by the board of adjustment * * * may present to the district court * * * a petition, duly verified, setting forth that the decision is illegal, in whole or in part * * * . The

petition shall be presented to the court within thirty days * * *."); *id.* § 33:4727(E)(5) ("The court may reverse or confirm, wholly or in part, or may modify the decision brought up for review.").

Me. Rev. Stat. Ann. tit. 5, § 11001 (West 2002 & Supp. 2003-2004) ("[A]ny person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court."); Me. Rev. Stat. Ann. tit. 5 § 11002(3) (West 2002 & Supp. 2003) ("The petition for review shall be filed within 30 days."); *Lippoth* v. *Zoning Bd. of Appeals, City of S. Portland*, 311 A.2d 552, 557 (Me. 1973) ("[T]he power of the court is limited to determining (a) the lawfulness of the action taken, * * * and (b) the reasonableness of such action.").

Md. Ann. Code art. 66B, § 4.08 (2003) ("[An aggrieved party] may, jointly or severally, appeal a decision of a board of appeals or a zoning action of a local legislative body to the circuit court * * * . The circuit court may not allow costs against the board unless it appears to the court that the board, in making the decision * * * acted: (1) [w]ith gross negligence; (2) [i]n bad faith; or (3) [w]ith malice."); Md. Cir. Ct. Rule 7-203(a) ("[A] petition for judicial review shall be filed within 30 days * * * ."); *Stansbury* v. *Jones*, 812 A.2d 312, 318 (Md. 2002) ("In judicial review of zoning matters, * * * the correct test to be applied is whether the issue before the administrative body is fairly debatable * * * .") (internal quotation marks omitted).

Mass. Gen. Laws. Ann. ch. 40A, § 17 (West 2004) ("Any person aggrieved by a decision of the board of appeals may appeal * * * by bringing an action within twenty days after the decision has been filed in the office of the city or the town clerk * * * . The court shall hear all evidence * * * and * * * annul such decision if found to exceed the authority of such board or permit granting authority or make such other decree as justice and equity require").

Mich. Comp. Laws Ann. § 125.293a (West 1997 & Supp. 2004) ("[A] person having an interest affected by the zoning ordinance may appeal to the circuit court * * * . As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals."); Mich. Ct. R. 7.101(B) ("[A]n appeal of right must be taken within 21 days.").

Minn. Stat. Ann. § 462.361 (West 2001) ("Any person aggrieved by an ordinance, rule, regulation, decision or order of a board of adjustments and appeals * * * may have such * * * reviewed by an appropriate remedy in the district court."); Minn. Stat. Ann. § 394.27(9) (West 1997) ("[A]ny aggrieved persons * * * shall have the right to appeal within 30 days."); *Kehr* v. *City of Roseville*, 426 N.W.2d 233, 235 (Minn. App. 1988) ("[T]he scope of review * * * to be used for zoning matters is * * * whether the zoning authority's action was reasonable.").

Miss. Code Ann. § 11-51-75 (LexisNexis 2002) ("Any person aggrieved by a judgment or decision of a board of supervisors * * * may appeal [to the circuit court] within ten (10) days."); *Barnes* v. *Bd. of Supervisors, DeSoto County*, 553 So.2d 508, 511 (Miss. 1989) ("If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court * * * . This is the same standard of review which applies in appeals from decisions of other administrative agencies and boards.").

Mo. Ann. Stat. § 89.110 (West 1998) ("Any person * * * aggrieved by any decision of the board of adjustment * * * may present to the circuit court * * * a petition, duly verified, setting forth that such decision is illegal * * * . Such petition shall be presented to the court within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Mont. Code Ann. § 76-2-327 (2003) ("Any person * * * aggrieved by any decision of the board of adjustment * * *

may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * *. Such petition shall be presented to the court within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."); see also *id.* § 76-2-227.

Neb. Rev. Stat. § 14-413 (2004) ("Any person * * * aggrieved by any decision of the board of appeals * * * may present to the district court a petition, duly verified, setting forth that such decision is illegal, in whole or in part * * * . Such petition must be presented to the court within thirty days."); *id.* § 14-414 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

Nev. Rev. Stat. Ann. § 278.3195 (LexisNexis 2002) ("Any person who: (a) has appealed a decision to the governing body * * * and, (b) is aggrieved by the decision of the governing body, may appeal that decision to the district court of the proper county by filing a petition for judicial review within 25 days."); *Nevada Contractors* v. *Washoe County*, 792 P.2d 31, 33 (Nev. 1990) ("If the [zoning decision] is supported by substantial evidence, there is no abuse of * * * discretion.").

N.H. Rev. Stat. Ann. § 677:4 (1996) ("Any person aggrieved by any order or decision of the zoning board of adjustment * * * may apply, by petition, to the superior court within 30 days."); *id.* § 677:11 ("The final judgment upon every appeal shall be a decree dismissing the appeal, or vacating the order or decision complained of in whole or in part, as the case may be; but, in case such order or decision is wholly or partly vacated, the court may also, in its discretion, remand the matter to the zoning board of adjustment.").

N.J. R. Civ. P. 4/69-6 § 4:6906 (providing for superior court review of a board of adjustment's decision by filing an

"action in lieu of prerogative writs" and mandating that, "No action in lieu of prerogative writs shall be commenced * * * to review a determination of a * * * board of adjustment * * * after 45 days from the publication of a notice."); *New Brunswick Cellular Tel. Co.* v. *Township of Edison Zoning Bd. of Adjustment*, 693 A.2d 180, 184 (N.J. Super. 1997) ("In reviewing any decision of a zoning board, the court's power is tightly circumscribed * * * . [Z]oning determinations may be set aside only when the court has determined the decision to be arbitrary, capricious or unreasonable.").

N.M. Stat. Ann. § 3-21-9 (West 2003) ("A person aggrieved by a decision of the zoning authority * * * may appeal the decision pursuant to the provisions of Section 30-3-1.1 * * * ."); *id.* § 39-3-1.1 ("[A] person aggrieved by a final decision may appeal the decision to district court by filing in district court a notice of appeal within thirty days * * * . [T]he district court may set aside, reverse or remand the final decision if it determines that: (1) the agency acted fraudulently, arbitrarily or capriciously; (2) the final agency decision was not supported by substantial evidence; or (3) the agency did not act in accordance with law.").

N.Y. Town Law § 267-c (McKinney 2004) ("Any person * * * aggrieved by any decision of the board of appeals * * * may apply to the supreme court for review * * * . Such proceeding shall be instituted within thirty days * * * . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.").

N.C. Gen. Stat. Ann. § 160A-381 (2003) ("[D]ecision[s] of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days."); *Butler* v. *City Council of the City of Clinton*, 584 S.E.2d 103, 105 (N.C. App. 2003) ("The trial court's review is limited to determining whether the conduct of the city council was in

accordance with the law and whether the decision was supported by competent, material, and substantial evidence.").

N.D. Cent. Code § 40-47-11 (1983 & Supp. 2003) ("A decision of the governing body of the city on an appeal from a decision of the board of adjustment may be appealed to the district court in the manner provided in section 28-34-01."); *id.* § 28-34-01 "The notice of appeal must be filed * * * within thirty days."); *City of Fargo* v. *Ness*, 529 N.W.2d 572 (N.D. 1995) ("In reviewing a decision of the city's governing body * * * , the trial court must be guided by separation of powers principles; judicial review of a nonjudicial governing body is limited to whether that body's decision is arbitrary, capricious, or unreasonable.").

Ohio Rev. Code Ann. § 2506.01 (Anderson 2001) ("Every final order, adjudication, or decision of any officer, tribunal, authority, [or] board, * * * may be reviewed by the court of common pleas."); *id.* § 2505.07 (Anderson 2001) ("[T]he period of time within which the appeal shall be perfected * * * is thirty days."); Ohio Rev. Code Ann. § 2506.04 (Anderson 2001 & Supp. 2003) ("The court may find the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from.").

Okla. Stat. Ann. tit. 11 § 44-110(A) (West 1994) ("An appeal from any action, decision, ruling, judgment, or order of the board of adjustment may be taken by any person * * * aggrieved * * * to the district court * * * . The appeal shall be taken * * * within the time limits which may be fixed by ordinance * * * . The district court may reverse or affirm, wholly or partly, or modify the decision brought up for review. Costs shall not be allowed against the board of adjustment unless it shall appear to the district court that

the board acted with gross negligence or in bad faith or with malice in making the decision appealed from.").

Or. Rev. Stat. Ann. § 197.850 (2003 & Supp. 2004) ("Any party to a proceeding before the Land Use Board of Appeals * * * may seek judicial review of a final order issued in those proceedings * * * . Proceedings for judicial review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 21 days * * * . [Attorney's fees may be awarded if] (a) [t]he party appealed a decision of the board to the Court of Appeals; and (b) [i]n making the decision being appealed * * * the board awarded attorney fees and expenses against that party under ORS 197.830 (15)(b) * * * [or if a party prevails on a claim] that an approval condition imposed by a local government on an application for a permit pursuant to ORS 215.416 or 227.175 is unconstitutional under section 18, Article I, Oregon Constitution, or the Fifth Amendment to the United States Constitution."); see also Or. Rev. Stat. Ann. § 197.830(15)(b) (2003) ("[The Land Use Board of Appeals] shall award reasonable attorneys fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was a well-founded in law or on factually supported information.").

53 Pa. Cons. Stat. Ann. § 11002-A (West 1997) ("All appeals from land use decisions * * * shall be taken to the court of common pleas * * * and shall be filed within 30 days."); 53 Pa. Cons. Stat. Ann. § 11006-A (West 1997 & Supp. 2004) ("In a land use appeal, the court shall have the power to * * * set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.").

R.I. Gen. Laws. § 45-24-69 (1999) ("An aggrieved party may appeal a decision of the zoning board of review to the superior court * * * by filing a complaint stating the reasons for the appeal within twenty (20) days * * * . The court may

affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced.").

S.C. Code Ann. § 6-29-820 (West 2004 & Supp. 2004) ("A person who may have a substantial interest in any decision of the board of appeals * * * may appeal from a decision of the board to the circuit court * * * by filing with the clerk of the court a petition in writing setting forth * * * why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed."); S.C. Code Ann. § 6-29-840 (West 2004) ("In determining the questions presented by the appeal, the court shall determine only whether the decision of the board is correct as a matter of law.").

S.D. Codified Laws § 11-2-61 (Michie 1995) ("Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, * * * may present to the court of record a petition, duly verified, setting forth that the decision is illegal * * * . The petition shall be presented to the court within thirty days after the filing of the decision."); *id.* § 11-2-65 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. Costs are not allowed against the board of adjustment unless the court determines that the board * * * acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.").

Tenn. Code Ann. §§ 27-9-101, 27-9-102 (LexisNexis 2000) ("Anyone who may be aggrieved by any final order or judgment of any board or commission * * * may have the order or judgment reviewed by the courts * * * . Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court."); *Brooks* v. *Fisher*, 705 S.W.2d 135, 136 (Tenn. App. 1985) ("Under common law writ of certiorari the scope of review by the trial court is limited to a

determination of whether the inferior tribunal has exceeded its jurisdiction, has foliowed unlawful procedure, has been guilty of arbitrary or capricious action or has acted without material evidence to support its decision.").

Tex. Loc. Gov't Code Ann. § 211.011 (West 1999 & Supp. 2004-2005) ("[An aggrieved person] may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part * * * . The petition must be presented within 10 days. The court may reverse or affirm, in whole or in part, or modify the decision that is appealed.").

Utah Code Ann. § 10-9-708 (2003) ("Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision * * * . The petition is barred unless it is filed within 30 days after the board of adjustment's decision is final * * * . The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.").

Vt. Stat. Ann. tit. 24 § 4471 (1992 & Supp. 2002) ("An interested person may appeal a decision of a board of adjustment * * * to the environmental court."); Vt. R. Civ. P. 76 ("An appeal taken under this rule shall be taken* * * within [30 days]." Vt. R. Civ. P. 76 ("The order of the court may affirm, reverse, or modify the decision of the board or commission and shall expressly set forth all conditions and restrictions with which the parties must comply.").

Va. Code Ann. § 15.2-2314 (LexisNexis 2003) ("Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, * * * may file with the clerk of the circuit court * * * a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board * * * . The court may reverse or

affirm, wholly or partly, or may modify the decision brought up for review.").

Wash. Rev. Code Ann. § 36.70C.060 (West 2003) ("[A] person aggrieved or adversely affected by the land use decision [may bring a challenge]."); *id.* § 37.70C.040 ("Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court * * *. The petition is timely if it is filed and served on all parties * * * within twenty-one days * * * ."); *id.* §36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings."); Wash. Rev. Code Ann. § 36.70C.130 (West 2003 & Supp. 2004) ("A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.").

W. Va. Code Ann. § 8A-9-1 (LexisNexis 2003) ("Within thirty days after a decision or order by the * * * board of zoning appeals, any aggrieved person may present to the circuit court * * * a duly verified petition for a writ of certiorari."); *id.* § 8A-9-6 ("[T]he court or judge may reverse, affirm or modify, in whole or in part, the decision or order.").

Wis. Stat. Ann. § 59.694(10) (West 2000) ("A person aggrieved by any decision of the board of adjustment, * * * may, within 30 days * * * , commence an action seeking the remedy available by certiorari. * * * The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.").

Wyo. R. App. P. 12.01 ("[A]ny person aggrieved or adversely affected in fact by a final decision of an agency * * * may obtain such review as provided in this rule."); Wyo. R. App. P. 12.03 ("The proceedings for judicial review under Rule 12 shall be instituted by filing a petition for review in the district court."); Wyo. R. App. P. 12.04 ("[T]he petition for review shall be filed within 30 days."); Wyo. R.

App. P. 12.09(d) ("The district court shall enter judgment reversing, vacating, remanding or modifying the order for errors appearing on the record.").

(12)

No. 03-1601

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court may grant relief for a municipality's zoning decisions that violate the federal rights of wireless service providers under 47 U.S.C. § 332(c)(7)(B) by awarding compensatory damages, either under § 332(c)(7)(B) itself or through 42 U.S.C. § 1983, and, in its discretion, attorney's fees under 42 U.S.C. § 1988(b).

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Equal Access to Justice Act
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H.R. Rep. No. 104-204 (1995) 5
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BOOKS, ARTICLES & TREATISES

Briffault, Richard, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346 (1990) 2

Eagle, Steven J., *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U.L. Rev. (forthcoming 2005) 8

Evans, Sara, *Wireless Service Providers* v. *Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 Ga. L. Rev. 965 (1998) 8

Gerrard, Michael B., *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495 (1994) 2

Gregory, Michelle & Douglas Martin, *Cellular Facilities: A Survey of Current Zoning Practices*, Zoning News (Apr. 1996) 3

Gustin, Timothy, *The Perpetual Growth and Controversy of the Cellular Superhighway: Cellular Tower Siting and the Telecommunications Act of 1996*, 23 Wm. Mitchell L. Rev. 1001 (1997) 1

Hughes, David W., *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469 (1998) 3, 8

Jackson, Irene McCormack, *Supervisors OK Plan for Cell-Phone Towers*, San Diego Union-Tribune, Jan. 24, 2001, at B1, *available at* http://www.telecomsol.com/tower_siting.html. 8

TABLE OF AUTHORITIES—Continued

Page(s)

Littlejohn, Jaymes D., *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 Fed. Comm. L.J. 247 (1993) 1

Long, Robert, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L.J. 373 (2000) 1

Margulies, Peter, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 Syracuse L. Rev. 945 (1992) 2

Restatement (Second) of Torts § 874A (1979) 30

Six Years After the Act, Industry, Cities Still Battling Over Towers, Telecommunications Reports, March 11, 2003 9

Tan, Gregory, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority Over Wireless Telecommunications Tower Siting*, 22 Vt. L. Rev. 461 (1997) 9

Tuesley, Malcolm J., Note, *Not In My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999) 8

3 Ziegler, Edward H., Jr. et al., *Rathkopf's The Law of Zoning and Planning* § 62:46 (2004) 32

OTHER AUTHORITIES

Cellular Telecommunications Industry Association's Petition for Rule Making, FCC Docket No. 97-192, http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi 3, 4

Fryer's Tower Source, http://www.towersource.com/mkt_analys_report.html 35

Guidelines for Facilities Siting Implementation and Informal Dispute Resolution, http://www.fcc.gov/statelocal/agreement.html 9

TABLE OF AUTHORITIES—Continued

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Petition For Declaratory Ruling of the Cellular Telecommunications Industry Association in the Matter of Federal Preemption of Moratoria Regulation Imposed by State and Local Governments On Siting of Telecommunications Facilities, *available at* http://www.ctia.org/regulatory/filings/body.cfm?Reg_ID=7 (Dec. 16, 1996) 9

STATUTORY PROVISIONS INVOLVED

The appendix to this brief contains relevant provisions of 28 U.S.C. § 1658, 42 U.S.C. § 1983, 42 U.S.C. § 1988, Section 601 of the Telecommunications Act of 1996, and Section 704 of the Telecommunications Act of 1996, which enacted into law 47 U.S.C. § 332(c)(7).

STATEMENT

A. Statutory Background

1. This case concerns Congress's effort to address a persistent obstacle to the development of a seamless nationwide network of wireless telecommunications services—namely, entrenched local opposition to the antennas that are essential to such services. As demand for wireless services has exploded, and as new technologies have developed, wireless service providers have been required to add thousands of new antennas to ensure the uninterrupted service that their customers demand. Wireless providers frequently have little practical choice as to where such antennas may be sited; local conditions, including buildings and the physical terrain, often limit the places where a service provider can locate its antennas and still provide acceptable service.[1]

Although wireless services have been extraordinarily popular with the public, the antenna structures on which they depend have been decidedly less welcome. Wireless companies seeking to provide service to their customers

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[1] *See* Brief of the Cellular Telecommunications & Internet Association ("CTIA") as *Amicus Curiae* at 1-5; Timothy Gustin, *The Perpetual Growth and Controversy of the Cellular Superhighway: Cellular Tower Siting and the Telecommunications Act of 1996*, 23 Wm. Mitchell L. Rev. 1001, 1005-1006 (1997); Jaymes D. Littlejohn, *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 Fed. Comm. L.J. 247, 247-250 (1993). As wireless subscribership grows, so does the need for additional antenna structures. *See* Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L.J. 373, 380-385 (2000) (noting that antennas can handle only limited call volume).

have encountered a well-known dysfunction of local government: the "NIMBY" problem—"not in my back yard." NIMBY describes the common phenomenon of individuals stridently opposing the placement of unpopular facilities in their communities even when everyone agrees that such facilities are necessary to the public good and should be placed somewhere—but always *elsewhere*.[2] Local officials tend to be responsive to the immediate opposition of the constituents who elected them rather than seemingly remote concerns about the need for the facilities in order to benefit the region or nation as a whole. Because the facilities often bring diffuse benefits but concentrated costs, voices of opposition frequently drown out voices of support.[3] It is often affluent communities that raise the loudest and most effective opposition, with the result that unpopular facilities are shifted to poorer and/or minority communities where opposition is less organized and carries less clout.[4]

Wireless service providers encountered this NIMBY problem in its classic form beginning in the 1990s, when demand for wireless service exploded but consumers who enjoyed the benefits of that service opposed siting of antennas in their communities. Local opposition to antennas for wireless services has tended to focus on three issues. First, individuals have expressed concern about possible adverse health effects from electromagnetic fields emanating from antennas—even though scientific studies have never documented any such adverse effects. Second, opponents have

[2] Other victims of NIMBY include low-income housing, homeless shelters, drug treatment facilities, group homes for the mentally ill, and waste disposal facilities. *See* Michael B. Gerrard, *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495, 497-509 (1994); Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 Syracuse L. Rev. 945, 946 (1992); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 435-447 (1990).

[3] *See* Margulies, *supra*, at 956-957 (discussing why groups supporting facility siting mobilize less readily than opponents).

[4] *See* Gerrard, *supra*, at 495-496; Margulies, *supra*, at 946-949.

maintained that antennas are visually unappealing and block desirable views (and wireless providers have often agreed to mask their antennas to address such concerns). Third, opponents have often expressed concern that erection of antennas would adversely affect the values of nearby residential properties.[5]

The local zoning process provided municipalities with numerous opportunities for obstruction and delay of the erection of antennas. These local bodies often impeded wireless facility construction by prolonging zoning proceedings, imposing cumbersome requirements and large fees, and habitually denying any new applications without following normal administrative procedures. In some instances, municipalities and zoning boards imposed moratoria on all new wireless facility siting proposals.[6] In others, zoning boards denied applications based on residents' aesthetic complaints or unsubstantiated health concerns, despite significant evidence supporting the wireless facility proposal.[7] Zoning

[5] *See* Michelle Gregory & Douglas Martin, *Cellular Facilities: A Survey of Current Zoning Practices*, Zoning News 1-6 (Apr. 1996) (discussing results of survey of jurisdictions about antenna siting practices). The survey revealed, among other things, that in every single responding jurisdiction, "strong opposition from adjacent residential or business property owners" had been the reason for denial of a permit to erect an antenna. *Id.* at 3.

[6] *See, e.g., Cellular Telephone Company (d/b/a Cellular One)* v. *Village of Tarrytown*, 624 N.Y.S.2d 170, 176 (App. Div. 1995).

[7] On one occasion, a local authority denied a permit because a resident alleged that an antenna killed her dog and gave her other pets headaches. *See* Comments of McCaw Cellular Communications, Inc. in Support of Petition for Rule Making, FCC Docket No. 97-192, at 14 (filed Feb. 17, 1995); David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469, 495 (1998) (sick pets caused antenna denial in West Hollywood, Cal.). *See also Gabriele* v. *Rocchio*, 1994 WL 930886 (R.I. Super. Ct. 1994) (reversing denial of permit based on unsupported aesthetic and health concerns); *Pennsylvania Cellular Telephone Corp.* v. *Board of Supervisors of Clifton Township*, No. 94-CIV-2595 (Pa. Comm. Pl. Lack. County 1994) (similar).

boards routinely demonstrated hostility to wireless facility applicants.[8]

In 1994, as wireless carriers' frustrations with localities grew, the industry association petitioned the FCC to consider preempting state and local zoning control of wireless facilities.[9] Numerous wireless carriers gave the FCC specific examples of the problems they had encountered with state and local governments in building their networks: moratoria on new facilities, lengthy and costly proceedings before zoning boards and planning commissions, and arbitrary and unsupported decisions, often based on unfounded health concerns.[10] Although the carriers had sought redress in state courts, these proceedings did not provide satisfactory relief. In addition to the cost and delays of litigation, carriers saw state-court judgments in their favor disregarded or maneuvered around by local bodies determined to prevent new facilities from being constructed.[11]

2. By 1995, the problem of entrenched local opposition to siting of wireless facilities attracted the attention of Congress, which had already made clear that state and local governments possessed only limited authority over wireless telecommunications. In 1993, Congress had preempted local regulation of market entry and rates "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of

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[8] *See* CTIA Brief at 25-29 (citing cases).

[9] *See* Cellular Telecommunications Industry Association's Petition for Rule Making, FCC Docket No. 97-192, at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (filed Dec. 22, 1994).

[10] *See, e.g.*, Comments of McCaw Cellular Communications, Inc. in Support of Petition for Rule Making, FCC Docket No. 97-192 (filed Feb. 17, 1995); Comments of Southwestern Bell Mobile Systems, Inc. (filed Feb. 16, 1995); Comments of NYNEX Mobile Communications Company (filed Feb. 17, 1995), at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi.

[11] In Tarrytown, New York, for example, the village adopted a highly restrictive zoning ordinance after state courts repeatedly invalidated a moratorium. *See* Comments of McCaw at 11-12.

the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993); *see* 47 U.S.C. § 332(c)(3), 107 Stat. 394. Congress at that time had preserved local authority over facilities siting. *See* H.R. Rep. No. 103-111, at 261. By 1995, however, Congress was faced with the reality that this local authority was being abused to impede new wireless services and technologies, and that some restrictions on local zoning authority were necessary.

The initial proposal to emerge in Congress would have largely removed siting authority from the States. The original version of what eventually became 47 U.S.C. § 332(c)(7) would have directed the FCC to convene a negotiated rulemaking committee for the purpose of prescribing a national policy for the siting of wireless facilities "necessary to provide efficient wireless telecommunications services to the public." H.R. Rep. No. 104-204, Pt. 1, at 94 (1995). This proposal was based on the conclusion that "current State and local requirements, siting and zoning decisions by non-federal units of government have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit" full deployment of wireless technology. *Id.*

Congress eventually decided not to go so far, but it nonetheless imposed significant restrictions on local zoning authority to ensure that local officials would not improperly use their control over potential antenna structure sites to prevent wireless service providers from constructing coherent regional or national networks. This removal of local impediments to national wireless service was part of Congress's overarching objective, in the Telecommunications Act of 1996 (TCA), to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996).

The new restrictions on local zoning authority became Section 704(a) of the TCA, entitled "National Wireless Telecommunications Policy." 110 Stat. 151. That section enacted a new 47 U.S.C. § 332(c)(7). Section 332(c)(7) first states, in

subparagraph (A), that nothing in the relevant chapter of Title 47 *other than* § 332(c)(7) limits the authority of state and local governments over decisions regarding facilities siting—making clear that § 332(c)(7) itself imposes such restrictions. It then establishes, in subparagraph (B), five significant restrictions on that authority to ensure that it is not abused to the detriment of wireless service providers and their customers:

First, local governments may not "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). Thus, municipalities may not refuse to site an antenna for a new service provider on the ground that its residents already have access to service provided by another carrier, nor may they favor one delivery technology over another where the two are equivalent.[12]

Second, local zoning may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). This provision bars local denials that effectively preclude wireless companies from providing service to areas in the community that are otherwise "dead spots."[13]

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[12] *See Omnipoint Communications* v. *Common Council of City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002) (city unreasonably discriminated against wireless provider when it subjected application to unprecedented scrutiny relative to other carriers' applications); *Western PCS II Corp.* v. *Extraterritorial Zoning Auth. of City and County of Santa Fe*, 957 F. Supp. 1230 (D.N.M. 1997) (municipality denied carrier opportunity to compete and significantly increased its costs, which amounted to unreasonable discrimination); *Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) (town unreasonably discriminated against carrier by denying its application when it had approved a virtually identical application from another carrier two months earlier).

[13] *See Cellular Tel. Co.* v. *Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) ("[L]ocal zoning policies and decisions have the effect of prohibiting wireless communications services if they result in 'significant gaps' in the availability of wireless services."); *see also Omnipoint Holdings, Inc.* v. *Town of Westford*, 206 F. Supp. 2d 166 (D. Mass. 2002) (town that denied application effectively prohibited wireless service where there was a significant gap in coverage and further applications would be futile); *National Tower LLC* v. *Frey*, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd*, 297 F.3d 14 (1st Cir. 2002) (denial of permit where two-mile coverage gap existed and no alternative site was available constituted effective prohibition of service); *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77 (D. Me. 2001) (town with no wireless antenna structures and virtually no wireless service had effectively prohibited service).

Third, any request to a local government for authorization to site a wireless facility must be acted on "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii)—thus rendering unlawful localities' prior foot-dragging techniques.[14]

Fourth, any decision to deny a siting request "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This provision ensures that siting decisions rest on a sound factual basis, rather than speculation or political pressure, and subjects siting denials to a uniform federal standard of review in the courts. That standard of review, "substantial evidence," is drawn from well-settled principles of federal administrative law. *See* H.R. Conf. Rep. No. 104-458, at 208 (1996); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1952).

Fifth, local officials may not make siting decisions based on the purported "environmental effects of radio frequency emissions," as long as the facilities comply with pertinent FCC regulations. 47 U.S.C. § 332(c)(7)(B)(iv).

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[14] *See Sprint Spectrum, L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) (local planning commission failed to act within a reasonable time where it enacted three successive moratoria and failed to process any applications for an extended period of time); *Sprint Spectrum, L.P.* v. *Town of Farmington*, 1997 WL 631104 (D. Conn. 1997) (moratorium that prevented carrier from even submitting application for 270 days constituted failure to act within a reasonable time). *See also Town of Amherst* v. *Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999) (noting that Congress intended § 332(c)(7)(B)(ii) to prevent municipalities from "exhaust[ing] applicants by requiring successive applications without giving any clue of what will do the trick").

In addition, Congress made clear that any wireless service provider whose application has been denied in violation of these prohibitions may obtain judicial relief. Under 47 U.S.C. § 332(c)(7)(B)(v), any person so adversely affected "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction," and the court "shall hear and decide such action on an expedited basis." Section 332(c)(7)(B) thus creates a series of specific, judicially-enforceable federal rights in providers of personal wireless services, but neither selects nor excludes any form of judicial relief.

3. Despite the enactment of § 332(c)(7), wireless service providers still encounter entrenched opposition to antenna siting.[15] Many municipalities reacted to the enactment of § 332(c)(7) by adopting moratoria (either *de jure* or *de facto*), in some cases lasting as long as two years, on any further antenna siting.[16] Wireless providers found it necessary to go back to the FCC to ask for relief from these moratoria.[17] The FCC established a committee of wireless carriers

[15] *See* Steven J. Eagle, *Wireless Telecommunications and the NIMBY Problem*, 54 Cath. U. L. Rev. (forthcoming 2005); Hughes, *When NIMBYs Attack*, *supra;* Malcolm J. Tuesley, Note, *Not In My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L. J. 887 (1999).

[16] *See Sprint Spectrum L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) (finding unlawful county's enactment of three consecutive moratoria, amounting to over 15 months); *Sprint Spectrum L.P.* v. *Town of Farmington*, 1997 WL 631104 (D. Conn. Oct. 6, 1997) (finding unlawful town's nine-month moratorium, which included the submission of new applications); Irene McCormack Jackson, *Supervisors OK Plan for Cell-Phone Towers*, San Diego Union-Trib., Jan. 24, 2001, at B1 (noting moratoria adopted by communities in California). Many municipalities use the services of consultants (paid for by the applicant) who advise municipalities on how to adopt what amounts to a moratorium on new facilities sitings. *See* http://www.telecomsol.com/tower_siting.html.

[17] *See* Sara A. Evans, *Wireless Service Providers v. Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 Ga. L. Rev. 965, 971 n.28 (1998). The petition filed by the Cellular Telecommunications & Internet Association included examples of more than 100 communities in which a moratorium on new antenna structure sitings was in place at the time. *See* http://www.ctia.org/regulatory/fil-ings/body.cfm?Reg_ID=7 .

and state and local government representatives, which eventually brokered a compromise under which moratoria were limited to 180 days.[18] Even where moratoria are not in place, wireless providers continue to face considerable challenges in navigating the local zoning process for each application.[19] And, notwithstanding § 332(c)(7)'s promise of expeditious relief from the courts, litigation challenging unlawful permit denials can last for many months or even years (as demonstrated by this case, *see* pp. 13-15, *infra*), during which time wireless providers may suffer substantial economic damages flowing from a violation of their federal rights, including the loss of customers if they are unable to provide seamless service, and incur substantial litigation costs.

B. Facts And Procedural History

1. Respondent Mark Abrams is licensed for amateur radio operations by the FCC. In that capacity, Abrams provides valuable services to the public.[20] Abrams also runs a company called Mobile Relay Associates, which is licensed by the FCC to provide personal wireless services. Pet. App. 22a; Stipulated Statements of Facts, *California* v. *Abrams*, No. BC 208586 (Cal. Super. Ct. filed Mar. 2, 2001) ("Stip."), ¶¶ 6, 29. Mobile Relay Associates provides a dispatch radio

[18] *See* http://www.fcc.gov/statelocal/agreement.html .

[19] *See Six Years After the Act, Industry, Cities Still Battling Over Towers*, Telecommunications Reports, March 11, 2003; Gregory Tan, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority Over Wireless Telecommunications Tower Siting*, 22 Vt. L. Rev. 461, 467-477 (1997).

[20] "As a group, amateur radio operators provide a valuable service to the public. They transmit information about emergency preparedness, national security, and disaster relief. Amateur radio has been credited, through the use of intercontinental communications, with enhancing international goodwill. And much of the highly developed radio communication technology existing today is the result of advances and discoveries made by amateur radio enthusiasts." *City of Rancho Palos Verdes* v. *Abrams*, 124 Cal. Rptr. 80, 82 (Cal. Ct. App. 2002).

service for police departments, fire trucks, taxicabs, school buses, tow trucks, and electricians. It competes with wireless providers such as Nextel, which provide a similar service but use different technology. Certified Administrative Record ("CAR") 763, 1524. Abrams provides these services using antennas at his residence, which is particularly well suited to this purpose because of its high elevation. *See City of Rancho Palos Verdes* v. *Abrams*, 124 Cal. Rptr. 2d 80, 82-83 (Cal. Ct. App. 2002); Stip ¶ 5. When this dispute began, no other provider in the City of Rancho Palos Verdes offered such personal wireless services. CAR 937.

This case concerns an antenna on Abrams' property that Abrams used exclusively for his amateur operations until city officials denied him the right to maintain a second antenna for commercial operations. In January 1990, Abrams obtained city approval to construct on his property a structure of 40 feet in height, including the antenna's underlying support structure but not the antenna itself, on his property for his amateur use. Pet. App. 22a, 54a; Stip. ¶ 8. Under a previous interpretation of the City's ordinances by its Planning Commission, Abrams' placement of a 12½-foot antenna atop this 40-foot structure was permissible. Thus, in April 1990, the City issued a permit for the antenna structure specifying a height of 52½ feet. Pet. App. 22a; CAR 50.[21]

For many years Abrams' antenna did not elicit any objection from the community. Disputes between Abrams and his neighbors arose in April 1997, when Abrams requested

[21] The City contends that local ordinances limited the total height of antennas, including both the supporting structure and the antenna itself, to 40 feet. *See* Pet. Br. 6 & n.2. Abrams has maintained that the pertinent ordinance limited only the supporting structure, exclusive of the actual antenna, to 40 feet. In the administrative proceedings that gave rise to this dispute, a member of the Planning Commission at the time that the pertinent antenna ordinance was enacted submitted a declaration to the effect that the total height of Abrams' structure, including the antenna extension, did not violate that antenna ordinance. CAR 351. In any event, there is no serious dispute that the City did issue a permit authorizing the antenna as built. *See* Pet. App. 22a.

the Planning Commission's approval for a second antenna, albeit shorter and less obtrusive than the one approved in 1990. The Planning Commission delayed action on that application for many months, deeming it incomplete at least three times. CAR 308; Stip. ¶¶ 17-18. The Commission eventually approved Abrams' application in January 1998. CAR 308; Stip. ¶ 21; Pet. App. 54a. The Commission's approval of the second antenna structure did not include any limitation to amateur operations. CAR 309.

A neighbor appealed the Planning Commission's approval of the second antenna to the City Council. Meanwhile, the City began to investigate allegations by the neighbor about the original antenna—specifically, that the structure exceeded its allowed height and that Abrams had improperly used it for commercial purposes. Pet. App. 54a; CAR 554. At a hearing before the Planning Commission in March 1998, Abrams acknowledged that he had used other antennas on his property (for which, he maintained, he did not need City approval)—but *not* the antenna approved in 1990—for commercial purposes. Pet. App. 40a; C.A. App. 110-111; *Abrams*, 124 Cal. Rptr. at 83-84; CAR 866. Abrams also maintained that he was permitted to use certain of his antennas for commercial purposes by virtue of his FCC licenses, which authorized his use of certain frequencies for commercial purposes and which (as a state appellate court later confirmed) preempted inconsistent limitations by the City. *See Abrams*, 124 Cal. Rptr. at 86.

While the investigation continued, the City Council enacted a moratorium against the acceptance and processing of applications for permits to construct more than one antenna structure on a property. Pet. App. 35a; CAR 554; Stip. ¶ 22. While the moratorium was in effect, the City cited the continued existence of Abrams' previously-approved antenna as its reason for denying his application for approval of other, unrelated improvements he had made on his property. Stip. ¶¶ 26-28. Following an extension by the City, the moratorium remained in effect for more than a year, until April 16, 1999, when the City enacted new regulations governing the

installation of antennas. Pet. App. 35a; Stip. ¶ 32. Those new rules had the effect of voiding Abrams' then two-year-old application for a second antenna support structure, which was still pending on appeal to the City Council. Pet. App. 35a-36a; CAR 554.

On April 12, 1999—less than a week before the moratorium ended and the new regulations came into effect—the City filed an action in state court to enjoin Abrams from using any antenna on his property for commercial purposes. Pet. App. 35a; *Abrams*, 124 Cal. Rptr. at 84. On June 29, 1999, the state trial court granted the motion for an injunction, and issued a written order on September 13 granting the relief the City sought. Pet. App. 35a. In the course of the proceedings, the state trial judge suggested that Abrams apply to the City for a conditional use permit (CUP) for commercial use of his antenna. *See Abrams*, 124 Cal. Rptr. at 84.

2. On July 12, 1999, Abrams applied to the Planning Commission for a CUP that would allow him to continue to use the existing antenna for additional radio frequencies allocated to personal wireless services, so that his business could continue to serve the area. Pet. App. 23a; CAR 16-38. The application explained that Abrams sought no modification of the existing antenna structure. CAR 17. The City's own notice of the project stated that "[n]o additional antennae or any change in the height, location or appearance of the existing antenna tower are proposed by the applicant." CAR 150.

After further delays and demands for information by the Planning Commission (CAR 43-46, 72-75, 84-85, 772-773), the Commission began to process the application and, on March 29, 2000, noticed it for a hearing and public comment. CAR 150. The application elicited opposition from Abrams' neighbors, who saw the hearing as an opportunity to force

Abrams to dismantle the existing antenna structure.[22] The hearing, which took place on April 25, 2000, reflected a mix of opinion in the community regarding Abrams' antenna. While some members of the community expressed opposition to the existing antenna structure, others commented on the usefulness of the service that Abrams provided. For example, a representative of the Los Angeles Unified School District stated that his association used Abrams' antenna structure to aid in communications among school buses. CAR 766-767. A company that provided much of the towing service for the City likewise reported its dependence on Abrams' service. CAR 551-552. After continuing the hearing to May 9, the Planning Commission denied Abrams' application. Pet. App. 54a-64a. Abrams appealed the decision to the City Council, which upheld the Commission on August 15, 2000. *Id.* at 34a-53a.

3. On August 24, 2000, Abrams commenced this action in district court. He contended that the City's denial of the CUP violated § 332(c)(7)(B)(i)(I), by unreasonably discriminating against the commercial mobile relay services that he sought to provide; § 332(c)(7)(B)(i)(II), by effectively prohibiting provision of such services within the City; and § 332(c)(7)(B)(iii), because the City's denial was not supported by substantial evidence in the administrative record. Relying on both the authorization for judicial relief in § 332(c)(7)(B)(v) and the express cause of action in 42 U.S.C. § 1983, Abrams sought an injunction directing issuance of the permit and money damages. He also sought attorney's fees under 42 U.S.C. § 1988(b).

The district court did not issue a decision until more than 16 months later, on January 9, 2002, when it ruled that Abrams' rights under § 332(c)(7)(B) had been violated and

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[22] In the words of the district court, "[i]t is clear from the record that the City, and particularly the community in which [Abrams] resides, detests [Abrams'] antenna structure." Pet. App. 23a; *see also* CAR 96, 99-100, 164-337. On community hostility towards Abrams, see the amicus brief filed by Certain Individual Rancho Palos Verdes Residents, *et al.*

vacated the City's denial of his CUP application. Pet. App. 16a-33a. Specifically, the district court ruled that the City's denial was not supported by substantial evidence, in violation of § 332(c)(7)(B)(iii). As the district court explained, although neighbors objected to the visual impact of the antenna and perceived damage to property values, "the fact remains [that the] antenna is already in existence, thus there is no further aesthetic impact created by [Abrams'] proposed use" of the antenna for personal wireless services. *Id.* at 23a. "Therefore, aesthetic concerns would not constitute a valid reason for the denial of the CUP in this case." *Id.* at 23a-24a. Nor could denial of the CUP properly rest on Abrams' alleged misuse of the antenna for commercial purposes in violation of the original 1990 permit, because "denial of the CUP would [not] require [Abrams] to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community." *Id.* at 24a.[23] The court also rejected the City's argument that granting the CUP could lead to a "proliferation in antennas," noting that the City "is free to deny additional applications if they pose additional problems." *Id.* at 25a.[24]

After further briefing on the proper remedy, the court limited Abrams to an injunction compelling the City to grant the CUP under reasonable conditions. The court denied

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[23] In addition, a state appellate court later concluded that the City's restriction on the use of the antenna to amateur operations was preempted by federal law. *Abrams*, 124 Cal. Rptr. at 86-91. Thus, reliance on that restriction to deny the CUP would have been improper in any event.

[24] In light of its conclusion that the City had violated the "substantial evidence" provision of § 332(c)(7)(B)(iii), the court found it unnecessary to decide whether the City's action also violated § 332(c)(7)(B)(i)(I) by unreasonably discriminating against Abrams as a provider of personal wireless services, which compete with but are not identical to cellular telephone services. Pet. App. 26a-30a. The court did observe that Abrams "appears to have carried his burden" on that point. *Id.* at 29a. The court also ruled that denial of the CUP did not amount to a prohibition on the provision of personal wireless services in violation of § 332(c)(7)(B)(i)(II). *Id.* at 30a-32a.

Abrams damages or attorney's fees, stating that "the remedies available to [Abrams] are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available." Pet. App. 14a.

4. Abrams appealed the denial of damages and attorney's fees. The City initially appealed the district court's decision on the merits, but dismissed its appeal after a state appellate court ruled that the City had never been empowered to limit Abrams' use of his antenna to amateur operations. *See Abrams*, 124 Cal. Rptr. at 86.

The court of appeals reversed the denial of damages and attorney's fees, ruling that Abrams was entitled to the remedies available under § 1983 for the City's violation of his federal rights. The court of appeals first noted that the City had not disputed that § 332(c)(7)(B) granted Abrams "enforceable 'rights'" under federal law. Pet. App. 4a. Thus, the court explained, the only question was whether Congress had affirmatively foreclosed access to § 1983 for redress of those rights. *Id.*

The court found no evidence that Congress had "close[d] the door on § 1983 liability." Pet. App. 5a (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997)). As the court explained, § 332(c)(7) does not expressly provide for any remedies (such as an injunction or damages); rather, it "only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress" violations[.]" *Id.* These features made § 332(c)(7) quite unlike the two statutes that this Court has found to foreclose liability under § 1983, both of which involved "unusually elaborate enforcement provisions." *Id.* at 6a (quoting *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)). In the absence of concrete evidence that Congress had affirmatively foreclosed resort to § 1983 to remedy violations of § 332(c)(7)(B), the court concluded that "Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." *Id.* at 7a.

The court found its conclusion to be buttressed by the savings provision of § 601(c)(1) of the TCA, which provides

that the TCA "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided" in the TCA. Pet. App. 10a (quoting 47 U.S.C. § 152 note, 110 Stat. 143). As the court observed, "the plain language of § 601(c)(1) demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change," and the TCA makes no reference to any alteration in the operation of § 1983. *Id.* In sum, the court concluded, "[t]he City failed to rebut the presumption in favor of § 1983 remedies. Accordingly, the presumption applies, and the district court should award § 1983 damages." *Id.* at 12a.

SUMMARY OF ARGUMENT

In 47 U.S.C. § 332(c)(7)(B), Congress acted to remove entrenched local obstacles to wireless services. It did so by protecting wireless service providers from local governments' arbitrary and unsupported denials of permits for the antennas on which wireless services depend. It also made clear that any person aggrieved by such arbitrary action could seek relief in the courts, without any limitation as to the remedies that might be awarded. The right to be free from an arbitrary and unsupported denial of a permit may be remedied by an award of compensatory damages, either under § 332(c)(7)(B) itself or 42 U.S.C. § 1983, as well as a discretionary award of attorney's fees under 42 U.S.C. § 1988(b).

A. Because (as petitioners have conceded) § 332(c)(7)(B) creates federal rights, a violation of those rights may presumptively be remedied in an action under § 1983. Petitioners have not made the strong showing necessary to support a conclusion that Congress has barred recourse to § 1983. This Court has never suggested that § 1983 is supplanted whenever Congress confirms, in a separate provision, that a plaintiff has recourse to the courts to vindicate his or her federal rights. Rather, the Court has found the § 1983 remedy withdrawn only after a clear showing that the congressional scheme creating the right in question would be incompatible with private judicial enforcement under § 1983—as,

for example, where Congress either expressly limited the judicial remedies available or established elaborate exhaustion requirements designed to ensure that federal court intervention comes only as a last resort.

B. 1. There is no conflict between § 1983 and Congress's confirmation, in § 332(c)(7)(B)(v), that plaintiffs may go to court to remedy violations of § 332(c)(7)(B). Section 332(c)(7)(B) does not suggest that a court is barred from awarding compensatory damages. Absent clear direction from Congress, the federal courts are presumptively authorized to award compensatory damages for the violation of a federal right. No such contrary direction is found in the text of § 332(c)(7)(B)(v). Nor is such a conclusion supported by petitioners' suggestion that Congress intended merely to follow state laws for judicial review of zoning decisions. To the contrary, Congress departed from such laws in important respects, and § 332(c)(7)(B) would not have been necessary had Congress considered state-law remedies to be adequate.

2. Petitioners' policy-based arguments against damages are misplaced. Petitioners speculate that the availability of damages may cause overdeterrence of local officials, but experience and logic suggest that, absent a damages remedy, local governments will be insufficiently attentive to providers' rights under § 332(c)(7)(B). Local officials have every incentive to deny permits for antennas that are unpopular with local residents, even if those denials are later overturned (without a damages remedy). The Court's § 1983 cases have also long established that municipalities may be liable in damages for violations of federal rights, even if the rights are embedded in complex statutory regimes and benefit entrepreneurs.

3. The 30-day statute of limitations in § 332(c)(7)(B)(v) does not present a conflict with enforcement under § 1983. That limitation period governs actions to vindicate rights secured by § 332(c)(7)(B), even if pursued under § 1983. Both the introductory clause of 28 U.S.C. § 1658(a) and 42 U.S.C. § 1988(a) make clear that a court entertaining a

§ 1983 action to enforce rights under § 332(c)(7)(B) should look to that very statute for a limitation period.

C. The savings clause in § 601(c)(1) of the Telecommunications Act (TCA) further confirms that § 1983 remains available. That clause prohibits any construction of the TCA that would modify, impair, or supersede any provision of federal, state, or local law. Petitioners' submission would "supersede" § 1983, in contravention of settled law. By contrast, state immunity laws for local governments would not be "impaired," because by definition they apply only to actions brought under state law; federal law does not recognize municipal immunity for violations of federal rights.

ARGUMENT

Section 1983 of Title 42 provides a judicial remedy "in an action at law, suit in equity, or other proper proceeding for redress" against "[e]very person" who, acting under color of state law, subjects "any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. As this Court has "repeatedly emphasized," the "central objective" of § 1983 "is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) (internal quotation marks omitted). Because § 1983 "provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation," it is "to be accorded a sweep as broad as its language." *Id.* (internal quotation marks and ellipses omitted).

To be sure, not every violation of federal law may be remedied through an action under § 1983. The Court has made clear, for example, that "to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). But when—as is undisputed in this case—a violation of a federal right by one acting under color of state law has been established, there is a strong presumption that the plaintiff may obtain redress for that violation through an action under § 1983. This presumption is rooted in the capacious language and broad remedial purpose of § 1983 itself. And an action under § 1983 affords the plaintiff access to the full panoply of judicial remedies traditionally available in "an action at law"—including compensatory damages. *See Owen* v. *City of Independence*, 445 U.S. 622, 639-648 (1980); *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978).[25]

This presumption that § 1983 is available to redress a violation of a federal right may be overcome only in "exceptional cases." *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994). Specifically, "Congress itself might make it clear that a violation of a statute will not give rise to liability under § 1983, either by express words or by providing a comprehensive alternative enforcement scheme." *Id.* The burden to demonstrate that Congress has withdrawn the § 1983 remedy "is on the defendant," *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989), and that showing is a "difficult" one, *see Blessing*, 520 U.S. at 346.

This Court has never held the § 1983 remedy to be precluded merely because Congress has *confirmed*, in another provision, that the plaintiff has access to state and federal courts in order to obtain redress for a violation of his federally secured rights. Rather, this Court has found the § 1983 remedy to be withdrawn only when that remedy would be

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[25] Petitioners conceded below that § 332(c)(7)(B) creates rights within the meaning of this Court's § 1983 jurisprudence, *see* Pet. C.A. Br. 3, and the court of appeals accepted that concession, *see* Pet. App. 4a. Neither in their petition for certiorari nor in their merits brief have petitioners attempted to withdraw that concession. Petitioners also dismissed their appeal from the district court's ruling on the merits that they violated § 332(c)(7)(B). *See* pp. 13-15, *supra*. Some of petitioners' *amici* have sought to raise the question of the existence of rights under § 332(c)(7)(B), but this Court's practice is not to entertain issues raised only by an *amicus*, especially when that issue was neither raised nor considered below. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

inconsistent with a "comprehensive alternative enforcement scheme" devised by Congress to correct a denial of a particular federal right. As explained further below, the Court has found the § 1983 remedy to be inconsistent with (a) congressionally devised notice and exhaustion requirements imposed as a precondition to invocation of a judicial remedy, and (b) express limitations on judicial remedies. Such restrictions contradict basic principles of the § 1983 action—that such actions "belong in court," *Felder*, 487 U.S. at 148 (emphasis omitted); *see Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and that a plaintiff in an action at law may obtain full compensatory relief, including damages.

No such inconsistency exists in this case. If anything, § 332(c)(7)(B) underscores that a plaintiff whose rights under that subsection have been abridged by a municipal government may seek immediate judicial relief, including compensatory damages, to redress that violation. And none of petitioners' various policy arguments overcomes the presumption that damages should be available to redress a violation of a federal right. Further, because petitioners have not made the "difficult showing" that redress may not be pursued under § 1983, respondent is entitled to apply for a reasonable attorney's fee under 42 U.S.C. § 1988(b). Anything less would deny respondent meaningful relief for petitioners' violation of his federal rights.

Congress enacted § 332(c)(7)(B) because it was concerned that municipalities were impeding the development of wireless telecommunications through their arbitrary treatment of wireless service providers who must erect antennas to serve their customers. To ensure that wireless providers would not encounter such obstacles in the future, Congress expressly stated that providers may bring municipalities to court when their rights under § 332(c)(7)(B) have been denied. Under petitioners' view, however, that confirmation of judicial review was ironical at best. Precisely by making it clear that wireless providers enjoyed federal statutory rights enforceable in federal courts, petitioners argue, Congress simultaneously deprived service providers

of the most effective remedy for their injury: compensatory damages. Nothing in § 332(c)(7), the text or history of § 1983, or this Court's jurisprudence regarding the enforcement mechanisms available to vindicate federal statutory rights supports such an anomalous result.

A. The Section 1983 Remedy Is Withdrawn Only When Congress Creates A Comprehensive Alternative Enforcement Scheme That Would Be Inconsistent With Section 1983

"Only twice [has this Court] found a remedial scheme sufficiently comprehensive to supplant § 1983." *Blessing*, 520 U.S. at 347. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court concluded that § 1983 did not provide a damages remedy for a violation of either the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251 *et seq.*, or the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401 *et seq.* Central to the Court's decision in that case were that (a) both statutes expressly limited a plaintiff's judicial remedy in a citizen's suit to injunctive relief and precluded damages, *see* 453 U.S. at 7, 14, and (b) both statutes also required plaintiffs to give 60 days' notice to the alleged violator (as well as the EPA and the pertinent State) before commencing a citizen's suit, *see id.* at 7-8, 20. Thus, Congress gave private parties a limited judicial remedy, and tied that remedy to an administrative one, in the expectation that the EPA, the State, and the alleged violator could resolve any controversy without the need for judicial intervention.

Similarly, in *Smith* v. *Robinson*, 468 U.S. 992 (1984), the Court concluded that § 1983 did not provide a remedy for violations of a disabled child's rights under the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400 *et seq.* (1982), or any factually-related equal protection claim.[26] In *Smith*,

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[26] The EHA has since been substantially amended and superseded by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.

the Court stressed the elaborate administrative mechanisms established by Congress to resolve controversies between parents and local education authorities about a child's educational rights under the statute.[27] As the Court explained, those congressionally-devised administrative procedures "effect[ed] Congress's intent that each child's individual needs be worked out through a process that begins on the local level." 468 U.S. at 1011. Thus, the Court concluded, "it is difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go *directly to court*." *Id.* (emphasis added). Such a bypass of the administrative procedures mandated under the EHA would "render superfluous most of the detailed procedural protections outlined in the statute" at the administrative level and would "run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together." *Id.*

These cases do not hold, as petitioners and the United States suggest, that the § 1983 remedy is barred whenever Congress states elsewhere, in a statute conferring a federal right, that a plaintiff may obtain relief in the courts for a violation of that right.[28] If that were the rule of *Sea Clammers*

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§§ 1400 *et seq.* As amended, IDEA presents issues similar to § 332(c)(7). Both statutes contain express rights of action, and both statutes have divided the courts of appeals on the question whether the rights secured thereunder may be enforced through § 1983. *Compare, e.g., Marie O.* v. *Edgar*, 131 F.3d 610 (7th Cir. 1997) (yes), *with, e.g., Padilla* v. *School Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000) (no). Petitioners' new rule—ousting § 1983 whenever an express right of action exists—would seemingly resolve that circuit split without allowing the Court the benefit of actually examining Congress's intent in passing IDEA or analyzing the statute's entire remedial scheme.

[27] The Court also expressed doubt that damages were available in an action under the EHA, although it did not resolve that issue. 468 U.S. at 1020 n.24.

[28] This is a reversal of position for the United States. In *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635 (2002), the United States argued that 47 U.S.C. § 252(e)(6), which expressly permits any party aggrieved by a state commission's determination under § 252 to seek relief in district court, was enforceable through § 1983. *See* U.S. Reply Br. in No. 00-1532, at 9-10 (Nov. 2001).

and *Smith*, this Court hardly would have referred to that rule as limited to "exceptional cases." *Livadas*, 512 U.S. at 133. To arrive at their desired conclusion, petitioners overstate the import of one sentence in *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427 (1987), where the Court noted that, "[i]n both *Sea Clammers* and *Smith* v. *Robinson*, the statutes at issue themselves provided for private judicial remedy, thereby evidencing congressional intent to supplant the § 1983 remedy." The Court surely did not decide in either *Sea Clammers* or *Smith* that *any* private judicial remedy would necessarily supplant § 1983; if that were the holding of those cases, then the Court would not have found it necessary to discuss at length either the statutory limitations on the form of judicial relief or the elaborate administrative procedures that would have been undermined by immediate access to court.

Rather, as is made clear from the immediately following sentence in *Wright*, the Court was making the point—which runs as a consistent theme in its § 1983 decisions—that the § 1983 remedy will *not* be deemed withdrawn when Congress has *not* expressly provided for private judicial relief. *See id.* ("There is nothing of that kind found in the Brooke Amendment or elsewhere in the Housing Act."); *see also Blessing*, 520 U.S. at 347; *Golden State*, 493 U.S. at 106. The inverse proposition—that the § 1983 remedy is withdrawn whenever Congress does provide for judicial relief—does not follow.

Sea Clammers and *Smith* establish only that access to § 1983 may be deemed foreclosed when the limitations on judicial relief that Congress has placed in the statute creating the federal right are inconsistent with the hallmarks of private judicial enforcement under § 1983. As the Court explained in *Blessing*, the § 1983 remedy is withdrawn only when Congress creates a remedial scheme "that is *incom-*

patible with individual enforcement under § 1983." 520 U.S. at 341 (emphasis added). Petitioners are attempting to expand those decisions to create a new rule that § 1983 is foreclosed whenever Congress elsewhere provides for judicial relief at all; but as explained above, if that were the teaching of those cases, most of the discussion in them would have been unnecessary.

The Court's consistent approach to this issue also explains two other decisions on which petitioners and their *amici* rely, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979). In *Preiser*, the Court ruled that a prisoner challenging the very fact or duration of his confinement must seek relief under the habeas corpus statute and not § 1983. That decision too rested squarely on the incompatibility between habeas procedures and § 1983, and in particular on the fact that, in the habeas statute, "Congress clearly required exhaustion of adequate state remedies as a condition precedent of federal judicial relief." 411 U.S. at 489. As the Court explained (*id.* at 489-490), "[i]t would wholly frustrate congressional intent" if that exhaustion requirement could be evaded simply by invoking § 1983, which does not require exhaustion of state court remedies, *see Patsy*, *supra*.

Similarly, in *Novotny*, the Court concluded that 42 U.S.C. § 1985(3) does not provide a remedy for a violation of rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court stressed there that, "[a]s part of its comprehensive plan" in Title VII, Congress required complainants to invoke the procedures of either the Equal Employment Opportunity Commission or a state or local fair employment agency. 442 U.S. at 373. The Court further noted that "the statutory plan [in Title VII] prevents immediate filing of judicial proceedings in order to encourage voluntary conciliation." *Id.* at 373-374. And Title VII "expressly authorize[d] only equitable remedies" at the time, whereas § 1985(3), like § 1983, authorizes compensatory damages as a remedy. *Id.* at 376. Thus, "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law." *Id.* at 375-376.

Like *Sea Clammers* and *Smith*, *Preiser* and *Novotny* indicate that access to the broad remedies of the Reconstruction-era civil rights statutes may be eliminated only when necessary to ensure the "[u]nimpaired effectiveness" of "the plan put together by Congress" for vindication of a statutory right (*Novotny*, 422 U.S. at 378). In particular, where Congress itself (a) precludes compensatory damages or (b) imposes elaborate exhaustion requirements in the hope that resort to federal court will ultimately be unnecessary to vindicate the federal right, it may be fair to infer that Congress intends that these limitations not be bypassed through recourse to § 1983. But these cases do not suggest that Congress will be deemed to have withdrawn the § 1983 cause of action merely because it has *confirmed* that a plaintiff may seek prompt judicial relief in any court of competent jurisdiction to enforce federal statutory rights. To the contrary, the cause of action created by § 1983 "exist[s] independently of any other legal or administrative relief that may be available as a matter of federal or state law." *Felder*, 487 U.S. at 148.

B. Nothing In Section 332(c)(7) Is Inconsistent With A Section 1983 Remedy

Petitioners make three general arguments why a violation of § 332(c)(7)(B) may not be remedied through § 1983. First, they argue that § 332(c)(7)(B), although itself providing a cause of action to redress a violation of rights under that provision, limits the relief available in that cause of action to equitable relief. Second, and more generally, they argue that damages and attorney's fees would be inappropriate to remedy a violation of § 332(c)(7)(B) because, if made available to wireless service providers, they would cause overdeterrence of local governments. Third, they contend that allowing access to relief under § 1983 would un-

dermine the short, 30-day statute of limitations in § 332(c)(7)(B)(v). Each of these arguments is incorrect.[29]

1. Section 332(c)(7) Itself Does Not Bar Damages As A Remedy

a. Petitioners' principal argument is that a violation of § 332(c)(7)(B)(i)-(iv) may be remedied only through § 332(c)(7)(B)(v), which (they further argue) precludes an award of damages. Nothing in § 332(c)(7)(B)(v), however, suggests that damages are not available under that provi-

[29] Petitioners also suggest (Pet. Br. 24-27) that Congress's intent to foreclose resort to § 1983 for a violation of § 332(c)(7)(B) can be inferred from the Telecommunications Act of 1996 as a whole (or its predecessor, the Communications Act of 1934). Petitioners note that, in the TCA and the Communications Act, Congress expressly authorized judicial remedies for violations of other, unrelated statutory provisions, most of which involve duties imposed exclusively on private entities. This suggestion is implausible. As the Court is well aware, the TCA was a vast undertaking, encompassing such widely disparate topics as indecency over the internet, *see Reno* v. *ACLU*, 521 U.S. 844 (1997), and increased competition in local wireline telephone service, *see Verizon Comms., Inc.* v. *Law Office of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). But only § 332(c)(7) addresses the harms at issue in this case—as § 332(c)(7)(A) makes clear. The fact that *other* TCA provisions remedy *other* harms does not establish the TCA as a comprehensive scheme to supplant § 1983 as a remedy for violations of the rights secured by § 332(c)(7)(B). Moreover, when Congress enacted the TCA, it built on another statute that had been enacted in many stages over many years. It would be wholly unrealistic to believe that Congress expected that all of the private remedies in the entire Communications Act would follow a uniform pattern.

It is particularly irrelevant that, in the TCA, Congress expressly provided for remedies, including damages and fees, in actions against *private* entities for statutory violations unrelated to the issues in this case. It was eminently sensible—and perhaps essential—for Congress to make clear in the text of the TCA itself when and how a cause of action could be pursued against private parties, given the trend in this Court's implied-right-of-action jurisprudence against inferring causes of action in the absence of express direction from Congress. *See, e.g., Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Section 1983, however, is an *express* right of action, and it is presumptively available to enforce any federal statutory right unless Congress clearly directs to the contrary. Congress has not done so in the TCA.

sion. Section 332(c)(7)(B)(v) states, in pertinent part, very simply: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this paragraph may, within 30 days, commence an action in any court of competent jurisdiction." This sentence makes no reference to any kind of remedy that might be awarded, and certainly does not state that any particular remedy is precluded.

In the absence of clear indication by Congress to the contrary, "where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992) (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). The *Franklin* Court applied this "traditional presumption in favor of all available remedies" to hold that damages may be awarded under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, despite Congress's failure to specify a remedy. 503 U.S. at 72. As the Court explained in *Franklin*, a "long line of cases" holds that, "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief," including compensatory damages. *Id.* at 69; *see id.* at 70-71 ("The general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."); *id.* at 71 ("prevailing presumption in our federal courts since at least the early 19th century" is that "all appropriate relief," including damages, may be awarded).

The Court has long stressed that damages are presumptively appropriate to ensure complete relief for a violation of a federally protected right. *See Owen*, 445 U.S. at 651 (describing damages as a "vital component of any scheme" for relief). Indeed, under the common law, money damages, not equitable relief, was presumptively the relief to be awarded for violation of a right; "it is axiomatic that a court should

determine the adequacy of a remedy in law *before* resorting to equitable relief." *Franklin*, 503 U.S. at 75-76 (emphasis added). And historically, "[l]ocal governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen*, 445 U.S. at 639. Were Abrams limited to equitable relief such as reversal of the permit denial, he would clearly receive inadequate redress for violation of his federal rights. Although Abrams eventually received the permit he should have received years earlier, he suffered substantial pecuniary loss in the interim. Under petitioners' submission, that loss would go entirely unredressed.

To be sure, the presumption in favor of damages may be overcome upon "clear direction to the contrary by Congress." *Franklin*, 503 U.S. at 70-71. Congress has made clear on many occasions when a remedy is to be limited to equitable relief.[30] But here Congress has provided no such direction. Neither the text nor the legislative history of § 332(c)(7) limits available remedies. Thus, contrary to petitioners' argument, compensatory damages would be available in an action brought directly under § 332(c)(7)(B)(v), even if a remedy under § 1983 were not available. *See Franklin*, 503 U.S. at 74 (refusal to award compensation for violation of a statutory right would be "to abdicate [the courts'] historic judicial authority to award appropriate relief in cases brought in our court system" (emphasis omitted)).

[30] *See Sea Clammers*, 453 U.S. at 7, 14 (stressing limitation in FWPCA to equitable relief); *Novotny*, 442 U.S. at 376 (stressing similar limitation in Title VII); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 151 n.5 (1970) (noting that Congress had made clear that relief under the public accommodations provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, was to be limited to injunctive relief, precisely so that Title II could not be enforced through § 1983, which could result in damages liability); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209-219 (2002) (stressing limitation in ERISA to "equitable relief"). *See also* pp. 34-35, *infra* (discussing Congress's revision of law governing cable operators).

b. Petitioners invoke *Barnes* v. *Gorman*, 536 U.S. 181 (2002), for the assertion that compensatory damages would not be "appropriate" relief for a violation of § 332(c)(7)(B). *Barnes* offers little support to petitioners. *Barnes* held that punitive damages are unavailable in an implied private right of action brought to redress violations of rights secured by a federal statute enacted pursuant to the Spending Clause. Noting that Spending Clause legislation resembles a contract between the federal government and the States, the Court in *Barnes* analogized the case before it to an action brought by a third-party beneficiary to a contract to enforce rights under the contract, and observed that "punitive damages . . . are generally not available for breach of contract." *Id.* at 187. Thus, the Court concluded that Congress should be presumed to have intended that punitive damages not be available in such an action.[31]

Barnes did not address the proper remedy for the violation of a right created by legislation not enacted under the Spending Clause. Nor did *Barnes* suggest that plaintiffs seeking redress for violations of such statutory rights should not be fully compensated for their injuries. To the contrary, the Court in *Barnes* expressly reaffirmed the rule of *Bell* v. *Hood*, *supra*, that damages are presumed to be available to redress a violation of a federal right, and observed that "[w]hen a federal-funds recipient violates conditions of Spending Clause legislation, . . . that wrong is 'made good' when the recipient *compensates* . . . a third-party beneficiary . . . for the loss caused by that failure." 536 U.S. at 189.

Similarly, when a local governmental entity violates rights secured by § 332(c)(7)(B), that wrong is "made good" when the municipality "compensates" the party whose rights are violated "for the loss caused by that failure." The principle of compensation is entirely appropriate for a viola-

[31] Punitive damages are generally presumed to be unavailable in a § 1983 action against a municipality, *see Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981), and would also be unavailable in an action brought to vindicate rights secured by § 332(c)(7)(B).

tion of § 332(c)(7)(B). That provision creates statutory duties, violations of which are generally remediable in tort principles, including compensatory damages.[32] Moreover, the specific duties created by § 332(c)(7)(B)—including the duty not to engage in unreasonable discrimination and the duty not to deny a permit without substantial evidence—establish obvious analogues to the constitutional principles of equal protection and due process (though affording less deference to the municipality's decision than the Constitution). It is well settled that a violation of those constitutional principles may be remedied through an award of compensatory damages. *See Carey*, 435 U.S. at 254-258. Just as § 1983 creates "a species of tort liability" for violations of the Constitution and laws of the United States, under which "[t]he cardinal principle" is "*compensation* for the injury caused to plaintiff by the defendant's breach of duty," *see id.* at 254, 255, so does § 332(c)(7)(B) anticipate that individuals whose rights are violated will be able to secure full relief under § 332(c)(7)(B)(v).

c. Petitioners further argue that § 332(c)(7)(B)(v) precludes damages because in enacting that provision, Congress intended to follow state statutes for judicial review of zoning decisions, which (petitioners maintain) do not allow damages

[32] A violation of a statutory duty owed to and creating rights for the benefit of a plaintiff is often considered a tort. *See* Restatement (Second) of Torts § 874A (1979); *see also Olympia Equipment Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) (defining antitrust violation as "statutory tort"). Petitioners suggest that, as *Barnes* analogized to contract, this case should be analogized to zoning law because it involves a challenge to a zoning decision. But petitioners misconstrue *Barnes*, which did not look to the underlying facts, but rather considered how a violation of an analogous legal right would have been remedied under the common law. In *Barnes*, the Court concluded that the proper analogy was a contract action because a State incurs obligations under Spending Clause legislation only by voluntarily accepting federal funds to which those obligations are attached. Here, the proper analogy is a tort action, because municipalities are obligated to respect legal rights that Congress has secured in legislation enacted under the Commerce Clause.

to be recovered.[33] Congress, however, quite clearly departed from state law in enacting § 332(c)(7)(B)(v). Indeed, if Congress had thought that state laws presented the proper approach, it is unlikely that Congress would have enacted § 332(c)(7) at all. That provision was deemed necessary precisely because local zoning officials were abusing their authority and blocking facilities essential to wireless telecommunications, and because wireless providers had been unsuccessful in obtaining relief at the state and local levels. *See* pp. 3-4, *supra*. Thus, like § 1983, which supplements remedies available under state law, *see Monroe* v. *Pape*, 365 U.S. 167, 176 (1961), § 332(c)(7)(B)(v) confirms the existence of a "uniquely federal remedy," *Felder*, 487 U.S. at 139, for the deprivation of federal rights secured by § 332(c)(7)(B).[34]

[33] Petitioners place much emphasis on the title of § 332(c)(7), "Preservation of local zoning authority." Actually, the title of § 704(a) of the TCA, which enacted § 332(c)(7) into law, is "National Wireless Telecommunications Policy," 110 Stat. 151, suggesting an overarching congressional focus on accomplishing federal policy objectives rather than protecting local authority. Furthermore, § 332(c)(7)(A), which restates the general rule that local governments have zoning power over antennas, states that "nothing in this *chapter* shall limit" local authority over the siting of personal wireless service facilities "*except* as provided in this *paragraph*." 47 U.S.C. § 332(c)(7)(A) (emphases added). In other words, Congress made clear that § 332(c)(7) is the *only* paragraph in Chapter 5 of Title 47 that *does* limit local zoning authority. Section 332(c)(7)(A) provides a rule of construction for the *remainder* of Chapter 5—a rule aptly captured by the title of § 332(c)(7)—and states that § 332(c)(7) is the *exception* to that rule.

[34] Petitioners suggest that the 30-day statute of limitations is engrafted from local zoning law. But this limitation period merely reflects Congress's desire to expedite antenna determinations, and echoes the telecommunications code's frequent use of 30-day limits where fast-moving technological and market dynamics demand swift resolution of legal disputes. *See, e.g.*, 47 U.S.C. § 252(e)(4) (arbitrated agreements between telecommunications carriers are deemed approved if State does not act within 30 days), § 273(d)(5) (alternative dispute resolution involving Bell operating companies must enable resolution within 30 days), § 302a(f)(4)(B) (person affected by state or local government regulation of citizen band radio equipment may seek FCC review within 30 days of such

Those federal rights are not mere carbon copies of rights available under state law, as petitioners and some *amici* suggest. To give one example, § 332(c)(7)(B)(iv) bars municipalities from basing a siting decision on concerns about electromagnetic fields, provided that the emissions comply with FCC guidelines. Petitioners do not suggest that state laws usually contain a similar prohibition. Similarly, § 332(c)(7)(B)(i)(II) bars municipalities from effectively precluding the provision of wireless service—in contrast to local zoning laws that normally allow the exclusion of *any* activity, subject only to constitutional constraints. In addition—and contrary to petitioners' argument that § 332(c)(7)(B)(v) is nothing more than an "appeal" provision allowing on-the-record judicial review of agency decision-making—the lower courts have concluded that plaintiffs may develop a *de novo* record in the district court, at least in actions for vindication of some of these rights.[35] Section 332(c)(7)(B)(v) also requires such a court to expedite its ad-

decision), § 307(d) (station licenses may not be renewed more than 30 days after expiration), § 309(e) (petition for intervention in licensing hearing must be filed within 30 days of publication of hearing issues in Federal Register), § 543(a)(4) (certification of cable franchising authority deemed approved unless FCC disapproves within 30 days).

[35] *National Tower, LLC* v. *Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 22 (1st Cir. 2002) ("The anti-prohibition, anti-discrimination, and unreasonable delay provisions, 47 U.S.C. § 332(c)(7)(B)(i)-(ii) . . . may well require evidence to be presented in court that is outside of the administrative record compiled by the local authority."); *APT Pittsburgh Ltd. Partnership* v. *Penn Tp. Butler County of Penn.*, 196 F.3d 469, 475 (3d Cir. 1999) (decision on claim of prohibition of service "will not necessarily be limited to the record compiled by the state or local authority"); *Airtouch Cellular* v. *City of El Cajon*, 83 F. Supp. 2d 1158, 1163-1164 (S.D. Cal. 2000) ("in a claim alleging discrimination among carriers or providers of personal wireless services, outside evidence may be considered"); *accord SNET Cellular, Inc.* v. *Angell*, 99 F. Supp. 2d 190, 194 (D.R.I. 2000). By contrast, parties seeking state judicial review of a zoning decision usually may introduce evidence only at "the discretion of the reviewing court." 3 Edward H. Ziegler, Jr., et al., *Rathkopf's The Law of Zoning and Planning* § 62:46 (2004).

judication, another provision that has no parallel in state zoning law.[36]

Petitioners argue that, even if an action to vindicate other rights secured by § 332(c)(7)(B) could be remedied in damages, an action to vindicate the particular right that the district court found violated in this case—the right not to have a permit denied without substantial evidence, § 332(c)(7)(B)(iii)—may not be so remedied. But there is no basis in § 332(c)(7)(B) to conclude that Congress intended the various rights secured by that provision to be treated differently for purposes of remedies. Section 332(c)(7)(B)(v) makes clear that *all* of the rights secured by § 332(c)(7)(B), without distinction, are enforceable in court. It is common for plaintiffs to allege violations of more than one of the rights secured by that subparagraph, and as the district court observed in this case (Pet. App. 27a-28a), the rights tend to overlap to some degree.[37] And even if the "substantial evidence" standard of § 332(c)(7)(B)(iii) resembles the judicial review standard applicable in some States, there is no reason to believe that Congress was simply transplanting all the remedial features of state judicial review provisions into federal law. In defining the "substantial evidence" right, Congress clearly chose a *federal* standard as a uniform requirement for local government permit denials.

[36] Petitioners and the United States suggest that Congress's requirement of expedition in § 332(c)(7)(B)(v) is somehow inconsistent with § 1983. That contention is meritless. Section 1983 contains no policy against expedition. To the extent that Congress chooses to emphasize that actions to enforce certain federal rights should be expedited, that congressional policy is perfectly consistent with the general policy in § 1983 of full and effective enforcement of federal rights.

[37] Indeed, in this case, Abrams has also raised a claim of unreasonable discrimination under § 332(c)(7)(B)(i)(I). Although the district court suggested that the unreasonable discrimination claim had merit, *see* Pet. App. 28a, the court found it unnecessary to resolve that claim given its finding that the City had violated the "substantial evidence" right, *see id.* at 30a.

Moreover, federal judicial review of local zoning decisions, though expanded by § 332(c)(7)(B), is not exactly novel. The Court long ago made clear that zoning decisions must comply with constitutional demands, including the Due Process Clause, *see Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928), the Equal Protection Clause, *see City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), and the Takings Clause, *see Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). Compensatory damages are available under § 1983 for violations of those federal rights. Nothing in § 332(c)(7)(B) suggests why damages should be available for violations of these constitutional guarantees in the context of zoning decisions, but not for violations of statutory provisions in the same context.

d. Finally, it bears note that, when Congress enacted the TCA, it knew well from recent experience how to limit telecommunications providers' remedies against municipalities—and knew the consequences of not doing so. In response to lower court decisions holding that municipalities could be sued under § 1983 to vindicate rights secured in various provisions of the telecommunications code, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, which expressly limited remedies available to cable operators in most actions against municipalities regarding franchising decisions or cable service regulation to injunctive and declaratory relief. *See* 47 U.S.C. § 555a; S. Rep. No. 102-92, at 48-50 (1991). Four years later, when the very same congressional committees legislated in the same arena of relations between telecommunications providers and municipalities, they were well aware of the consequences of not expressly limiting available relief. Yet they did not, suggesting strongly the absence of any intention to foreclose either damages remedies or the availability of § 1983.

2. Petitioners' Policy Arguments Against Damages And Attorney's Fees Are Misplaced

a. Petitioners put forward several policy arguments why compensatory damages (under § 332(c)(7)(B)(v) or § 1983) and attorney's fees (under § 1988(b)) should not be available as remedies for violations of § 332(c)(7)(B). Although these arguments take different forms, they are all essentially variations on the same theme: wealthy telecommunications companies should not be allowed to obtain compensatory damages and attorney's fees from financially strapped local governments. The argument assumes that litigation over § 332(c)(7)(B) will necessarily pit a corporate behemoth against a hamlet. This very case, however, rebuts petitioners' stereotype. Mr. Abrams is an independent entrepreneur seeking to provide services on a small scale to residents of his community and the surrounding area. There are no doubt hundreds of similar ventures around the country providing wireless services of various types to local residents.[38] Should these service providers fail to receive adequate compensation for violations of their statutory rights (especially after being compelled to institute expensive litigation), they could well go out of business, which would frustrate Congress's purpose in enacting § 332(c)(7) of ensuring wide diffusion of, and vigorous competition in, wireless services.

In any event, the policy arguments that municipalities should not be required to pay damages (under § 1983) or at-

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[38] *See* Brief of the American Mobile Telecommunications Association as *Amicus Curiae*. Although there are few published sources about the numbers of antenna structures owned by wireless service providers, we are informed by representatives at Fryer's Tower Source, which maintains antenna structure statistics, that approximately 35,000 such structures are owned by about 9,500 companies with an inventory of 10 structures or fewer. In addition, about 2,000-2,500 carriers depend on antenna structure companies because they do not own structures themselves. The number of structures owned by such "mom and pop" antenna structure companies is roughly to equal to the number owned by major wireless carriers. *See* http://www.towersource.com/mkt_analys_report.html .

torney's fees (under § 1988(b)) for violations of federal rights have been considered, and rejected, by this Court many times. They have been rejected because they *are* policy arguments and therefore are properly addressed to Congress. Congress has made clear, in the text of § 1983, that municipalities are required to compensate those whose federal rights they violate. *See Owen*, 445 U.S. at 650-652. And the text of § 1988(b) makes equally clear that "fees are available in *any* § 1983 action." *Maine* v. *Thiboutot*, 448 U.S. 1, 9 (1980). Section 1988(b) "makes no exception for statutory § 1983 actions," *id.*, or for § 1983 actions against municipalities.

Petitioners speculate that damages and attorney's fees will cause overdeterrence—that municipalities, fearing an expensive reversal of their policies in the federal courts, will overreact by granting permits that should not otherwise have been granted under state law. This is a common argument against a damages remedy. Its merits are debatable. What is not debatable is that when Congress made damages available under § 1983, it had precisely the opposite perspective—that absent the prospect of being required to pay full compensatory relief, municipalities might well fail to give proper consideration to individuals' federal rights. *See Owen*, 445 U.S. at 651-652.

There is good reason to believe that, absent a damages remedy for violations of § 332(c)(7)(B), municipalities would be insufficiently attentive to the rights secured by that section. As this case demonstrates, controversies over wireless antennas often feature organized vocal opposition by residents who are content to reap the benefits of wireless technology as long as some other community bears its costs. Without the deterrent potential of damages, local elected officials would have every incentive to appease their constituents and deny the permit—especially if, as petitioners suggest, the party seeking a site for the antenna will often be an out-of-town, nonvoting corporation. Even if, years later, a federal court orders them to grant the permit, the local officials would be in far better stead with their constituents than if they had acquiesced at the start. But a belated judicial "victory" would come at a considerable cost to a business owner such as Abrams, who is at risk of losing customers in the interim. The damages remedy of § 1983 was intended precisely to make sure that governmental actors would not shift the cost of their violations of federal rights to individuals in that way. *Cf. Memphis Cmty. School Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (noting that "[d]eterrence is also an important part" of § 1983, and that it "operates through the mechanism of damages that are compensatory" (emphasis omitted)).

b. Petitioners also argue (Br. 29-30) that damages are inappropriate in cases involving § 332(c)(7)(B) because that provision presents difficult legal issues about which local officials might guess wrong, ultimately to the fiscal detriment of the municipality. Petitioners' characterization of the complexity of § 332(c)(7)(B) is considerably exaggerated; there is no particular mystery about a rule barring reliance on environmental effects or requiring substantial evidence for a decision. Indeed, petitioners' position rests on the assumption that many of the requirements in § 332(c)(7)(B) merely restate well-known legal standards under state zoning law, with which municipal officials (or at least municipal lawyers) should be quite familiar.

The more fundamental point, however, is that there is no "difficult issue" exception for municipalities under § 1983 or § 1988(b).[39] Had the Court found this sort of argument persuasive, it most likely would not have ruled in *Owen* that municipalities have no good-faith immunity to § 1983 damages actions. *See* 445 U.S. at 651-652.[40] This Court has de-

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[39] Of course, local officials possess qualified immunity for violations of rights that were not clearly established at the time of the violation. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

[40] The Court was aware that the merits of the underlying legal issue in *Owen* were highly debatable, and the municipality's legal position was at least reasonable. *Owen* involved a police chief's challenge to his termination as a violation of his procedural due process rights. The court of

cided numerous § 1983 cases in which state and local officials were called on to administer highly involved federal statutory regimes or follow complicated constitutional doctrine, but it has never deemed the complexity of a legal issue to be a relevant factor in determining whether a municipality may be sued under § 1983. For example, in *Wright* v. *City of Roanoke*, *supra*, the Court ruled that a local governmental entity could be sued under § 1983 for a violation of the Brooke Amendment to the United States Housing Act, 42 U.S.C. § 1437a, *see* 479 U.S. at 423-432, even though the implementing agency regulations covered several pages and required local authorities to consider "a host of factors," *see id.* at 437 (O'Connor, J., dissenting). Similarly, the Court ruled in *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), that § 1983 was available to enforce a provision of the Medicaid Act, the complexity of which is legendary.[41]

More generally, petitioners appear to suggest that it is inappropriate for business owners whose federal rights have been violated to invoke § 1983 for monetary relief from governmental units. But nothing in § 1983 precludes relief for entrepreneurs. To the contrary, it affords relief to "*any citi-*

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appeals divided over whether the plaintiff had a liberty interest protected by the Due Process Clause or whether his claim was barred by *Paul* v. *Davis*, 424 U.S. 693 (1976). *Compare Owen* v. *City of Independence*, 560 F.2d 925, 935 (8th Cir. 1977) *with id.* at 941-942 (Van Oosterhout, J., dissenting). Similarly, *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which recognized the principle of municipal liability under § 1983, involved a city policy of mandatory leave for pregnant employees that was at least arguably constitutional at the time suit was instituted in that case in 1971; such policies were not invalidated until this Court's divided decision in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). And in *Golden State*, the Court concluded that an employer could invoke § 1983 to remedy the city's violation of its rights under the National Labor Relations Act, *see* 493 U.S. at 111-112, even though the Court itself had divided on the merits of the underlying NLRA question in a prior decision, *see Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986).

[41] *See, e.g., Friedman* v. *Berger*, 547 F.2d 724, 727 n.5 (2d Cir. 1976) (Friendly, J.).

zen of the United States or *person* within the jurisdiction thereof" whose federal rights have been violated under color of state law. Accordingly, the Court has often found that statute to be available for vindication of the rights of entrepreneurs, no less than any other citizen or person within United States jurisdiction. In *Golden State*, the Court concluded that an employer could invoke § 1983 to vindicate its rights under the National Labor Relations Act to be free of municipal interference in its dispute with its employees' union. 493 U.S. at 112. In *Dennis* v. *Higgins*, 498 U.S. 439 (1991), the Court ruled that a motor carrier could invoke § 1983 to enforce his rights under the dormant Commerce Clause against discriminatory state taxation, and refused to limit § 1983 "to 'personal' rights, as opposed to 'property' rights." *Id.* at 445. And *Wilder* v. *Virginia Hospital Ass'n* confirmed that § 1983 was available for the enforcement of federal statutory rights by the hospital industry. 496 U.S. at 503.

Congress could undoubtedly determine that damages or fees should not be available in § 1983 suits brought by corporations or individuals with certain means. Congress has done something similar in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which generally allows an award of attorney's fees to a prevailing party in a suit against the United States. The EAJA precludes an award of fees to any individual whose net worth exceeded $2,000,000 at the time the civil action was instituted, or to the owner of any business with a net worth of more than $7,000,000 or more than 500 employees at that time. *See* 28 U.S.C. § 2412(d)(2)(B). Congress has done nothing of the sort, however, with respect to § 1983 or § 1988(b), and nothing in the text of either statute permits the courts to interpolate such a limitation.[42]

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[42] As this case well demonstrates, not all § 1983 plaintiffs in the wireless context will be large corporations. But in any event, it is well established that, in light of Congress's broad policy of ensuring effective enforcement of federal rights through § 1983, the plaintiff's ability to pay for its own counsel does not preclude a fee award under § 1988(b). *See*

c. Finally, there is no merit to petitioners' suggestion that, if fees are available under § 1988(b) to service providers whose rights under § 332(c)(7)(B) have been violated, local governments will be routinely forced to pay enormous legal bills that will break the municipal bank. The federal courts have developed extensive experience with § 1988(b) and have devised numerous principles and safeguards to ensure that fees awarded under § 1988(b) are, as the statute on its face requires, "reasonable." "It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989). The court's discretion in this regard is well defined, and there "exists a wide range of safeguards designed to protect civil rights defendants against the possibility of excessive fee awards." *City of Riverside* v. *Rivera*, 477 U.S. 561, 580 (1986); *see also Blanchard*, 489 U.S. at 96 (stating that "the very nature of recovery under § 1988 is designed to prevent [a] 'windfall'").

Above all, the attorney's fees awarded must reflect "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Thus, a court must deduct fees associated with hours that are "excessive, redundant, or otherwise unnecessary." *Id.* at 434. The court may also reduce the fee amount if the party seeking to recover it fails to satisfy its burden of documenting the propriety of the rates and hours claimed. *Id.* at 433. Even once this "lodestar" amount is calculated, it represents merely the "starting point" for determining the fee award, as the court must take other considerations into account. *Id.* at 433-434. Central among these is "the degree of success obtained." *See Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992). Thus, a party may not recover fees for work related only to claims on which it did not prevail, and may have its fees reduced if it "achieved only partial or limited success" in the lawsuit as a whole. *Hensley*, 461 U.S. at 434-435. Courts that have awarded attorney's fees in § 1983 suits brought by wireless companies have strictly adhered to these limitations and reduced attorney's fees as necessary.[43]

A court may further reduce a fee award if "special circumstances would render such an award unjust." *See Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). Municipalities are also not without recourse as defendants: if a wireless company's § 1983 lawsuit is deemed frivolous or was brought to harass, the city may seek to recover attorney's fees. *See City of Riverside*, 477 U.S. at 580. All of these safeguards can be expected to preclude the dire results that petitioners and others predict.

3. The Statute Of Limitations Under Section 332(c)(7)(B)(v) Presents No Conflict With Section 1983

Petitioners and the United States argue that enforcement of the rights secured by § 332(c)(7)(B) through § 1983 would be inconsistent with the short, 30-day statute of limi-

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Blanchard v. *Bergeron*, 489 U.S. 87, 94 (1989) ("Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of [§ 1988]."). Even plaintiffs who can afford counsel might well hesitate to bring an action to vindicate their federal rights in light of the expense of legal proceedings.

[43] *See, e.g., Smart SMR of N.Y., Inc.* v. *Zoning Comm'n*, 9 F. Supp. 2d 143, 147-153 (D. Conn. 1998) (reducing a fee award based on the court's findings that the time spent preparing various pleadings was unnecessary and excessive, that some of the work related to administrative proceedings that occurred prior to the initiation of suit, and that the attorneys' time records were vague and insufficient); Memorandum Decision and Order, *Omnipoint Comms., Inc.* v. *City of White Plains*, No. 01 Civ. 3285, at 5-6 (S.D.N.Y. May 6, 2004) (reducing attorney's fees by 50%, after attorneys had already adjusted them by 50% to account for only partial victory, based on court's findings that the time entries were inadequate and that the attorneys did not present sufficient evidence regarding their experience and justification of their hourly rates); *see also Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187, 1200 (W.D.N.Y. 2003) (describing the standard for determining a reasonable award of attorney's fees).

tations set out in § 332(c)(7)(B)(v). The curious assumption underlying this argument is that, if such a case were to proceed under § 1983 rather than directly under § 332(c)(7)(B)(v), a court entertaining the action would be *forbidden* to follow the 30-day limitation period that Congress enacted for enforcement of rights under § 332(c)(7)(B). Thus, petitioners and the government suggest, the court would have to apply either the residual four-year statute of limitations for federal causes of action in 28 U.S.C. § 1658 or a borrowed state statute of limitations. Neither proposition is correct. As we now show, a court adjudicating a § 1983 action to enforce the rights in § 332(c)(7)(B) should apply the 30-day statute of limitations attached to that section. Accordingly, there is no conflict between § 1983 and § 332(c)(7)(B) on this point.

a. This Court has often observed that § 1983 itself has no statute of limitations. *See, e.g., Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985). The constitutional provisions enforced through § 1983 also have no limitation periods attached to them. Accordingly, this Court concluded in *Wilson* that, for constitutional claims enforced through § 1983, courts should apply the general state statute of limitations for personal injury claims. In reaching that conclusion, the Court followed the directions of Congress set forth in 42 U.S.C. § 1988(a) with respect to filling gaps in federal civil rights laws, including § 1983. *See Wilson*, 471 U.S. at 268. Under § 1988(a), the jurisdiction of the district courts over civil rights cases "shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry [the civil rights laws] into effect," but where no federal statute is "adapted to the object," the courts are to follow state law "so far as the same is not inconsistent with the Constitution and laws of the United States." Because no federal statute is "adapted to the object" of providing a limitation period for constitutional claims under § 1983, courts look to state law for the length of the limitation period (though federal principles govern *which* state period is to be adopted, *see id.* at 269).

The Court's decision in *Wilson* was consistent with its general approach of adopting state statutes of limitations for federal causes of action where no federal statute of limitations was specified or otherwise suitable. *See Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987) (borrowing state statute of limitations to apply to action under 42 U.S.C. § 1981). Subsequently, however, Congress enacted 28 U.S.C. § 1658(a), which—for civil claims arising under federal statutes enacted after December 1, 1990—provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."

Petitioners argue that, if this case were to proceed under § 1983 rather than directly under § 332(c)(7)(B)(v), a court would have to apply the general four-year limitation period in § 1658(a). That is so, they contend, because Abrams' claim "aris[es] under" § 332(c)(7)(B), which was enacted after December 1, 1990. They further argue that the general four-year limitation period of § 1658(a) would be inconsistent with Congress's emphasis on expeditious resolution of controversies involving § 332(c)(7)(B), as evinced by the 30-day statute of limitations in § 332(c)(7)(B)(v) and Congress's direction in the same provision that all such actions be expedited.

But petitioners' argument overlooks the crucial initial clause of § 1658(a): "Except as otherwise provided by law". Congress has surely "otherwise provided," in § 332(c)(7)(B)(v), that a claim to enforce the rights set forth in § 332(c)(7)(B) must be brought within 30 days, even if the claim is brought under § 1983. Thus, even if this case "arises under" § 332(c)(7)(B), within the meaning of § 1658(a), nothing in § 1658(a) suggests that a court should look anywhere

other than § 332(c)(7)(B) for an appropriate limitation period to govern actions to enforce that very provision.[44]

This situation is similar to those in which the Court has concluded that it should look to another federal statute, rather than a state law, for the proper statute of limitations to govern a federal cause of action. For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the Court concluded that, for private actions arising under § 10(b) of the Securities Exchange Act of 1934, the Court should adopt the limitation period appearing in related provisions of the Exchange Act. The Court observed that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provisions than the balance struck by the same Congress in limiting similar and related protections. When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end." *Id.* at 359 (citation omitted).[45] The case for applying the limitation period in the "statute of origin" is even stronger here, where the limitation period appears not in a "similar and related" provision, but in the very provision that is being enforced.

Petitioners erroneously suggest (Pet. Br. 33-34) that, under *Sea Clammers* and *Smith*, a court may not "transplant[]" any procedural requirements, including a statute of limitations, from another federal statute onto a § 1983 action.

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[44] Although petitioners rely on *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004), to argue that the four-year statute of limitations would apply were the action brought under § 1983, they overlook that the Court had no occasion in *Jones* to consider the "[e]xcept as otherwise provided by law" clause of § 1658(a) precisely because that case involved a suit to enforce rights under a federal statute, 42 U.S.C. § 1981, that does not itself have a statute of limitations.

[45] *See also Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-156 (1987) (looking to Clayton Act rather than state law for statute of limitations for civil RICO actions); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 161-171 (1983) (looking to federal labor law rather than state law for limitation period for hybrid § 301/duty of fair representation claim).

A statute of limitations, however, is not like the procedural restrictions at issue in those cases, which the Court deemed inconsistent with fundamental attributes of the § 1983 action. Section 1983 lacks its own statute of limitations, and so the limitation period for a § 1983 action is *always* transplanted from somewhere else—the only question is the source.[46] Whereas there might be situations where a *state* statute of limitations would be inappropriate to the goal of effective enforcement of *federal* rights enshrined in § 1983, *see Wilson*, 471 U.S. at 279, that could hardly be said of the federal statute of limitations that Congress itself attached to the federal right at issue.

b. Nor would a federal court apply a *state* statute of limitations to an action to vindicate rights secured by § 332(c)(7)(B), even if those rights are enforced through a § 1983 action. Conceivably, such a § 1983 action might be thought of as "arising under" § 1983 itself, rather than § 332(c)(7)(B).[47] But if that were the case, then it is clear from § 1988(a)—which is nowhere mentioned by petitioners or the government—that the 30-day limitation period of § 332(c)(7)(B)(v) would apply.

Section 1988(a) provides that, in actions under the federal civil rights laws, including § 1983, the courts shall exer-

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[46] The Court has rejected the possibility that *no* limitation period might apply to § 1983 actions. *See Wilson*, 471 U.S. at 271 (stating that such a rule would be "utterly repugnant to the genius of our laws") (quoting *Adams* v. *Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)); *see also Malley-Duff*, 483 U.S. at 156.

[47] The government suggests (U.S. Br. 23-24 n.4) that it is not altogether clear that Abrams' claim arises under § 332(c)(7)(B); the claim might be deemed to arise under § 1983—which was not enacted after December 1, 1990. This Court's recent decision in *Jones*, *supra*, may not definitively resolve that question, because *Jones* involved a claim that arose under a statute, § 1981, that provided both the underlying right and the cause of action. By contrast, § 1983 is only a cause of action and is not itself a source of rights. The issue is academic in this case because (as explained in the text) whether Abrams' claim is deemed to arise under § 332(c)(7)(B), § 1983, or both, the 30-day statute of limitations applies if the claim is brought under § 1983.

cise their jurisdiction "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." Only if no "suitable federal rule exists" are courts to consider applying state law to fill the interstices of federal law. *See Wilson*, 471 U.S. at 267. In an action brought under § 1983 to enforce a federal *statutory* right where the pertinent statute itself provides a limitation period, it would surely be "suitable" for the courts to apply that very federal statute of limitations. It could hardly be "in conformity with the laws of the United States," § 1988(a), for a court to ignore that federal limitation period and apply a conflicting state statute of limitations.

Although the Court has held that state general personal injury statutes of limitations govern *constitutional* claims brought under § 1983, *see Wilson*, 471 U.S. at 271-272, that rule reflects the fact that no other federal law provides a statute of limitations for constitutional violations, and so the only place for the courts to look for a limitation period is state law. In the case of a § 1983 action to enforce statutory rights where the underlying statute itself provides the answer, there is no need for the Court to take the second step of looking to state law. The inquiry "should be at an end" with the federal statute. *Lampf*, 501 U.S. at 359.[48]

In sum, there is no reason to conclude that, in a § 1983 action brought to enforce rights under § 332(c)(7)(B), a court would apply either the four-year residual statute of limitations in § 1658(a) or a state statute of limitations under the "borrowing" principle of *Wilson*. The court would simply

[48] Given the goal of expedition, it would surely be "inconsistent with" and not "in conformity with" federal law, § 1988(a), to adopt a longer state statute of limitations, as the government proposes. *See DelCostello*, 462 U.S. at 161 (borrowing federal statute of limitations because it would be "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law").

apply the limitation period found in § 332(c)(7)(B) itself. That provision, therefore, does not conflict with § 1983.[49]

C. Any Doubt About The Availability Of Section 1983 Is Resolved By The Savings Clause In Section 601 Of The Telecommunications Act

Petitioners' novel theory that any express cause of action to enforce a statutory right automatically displaces § 1983 cannot be squared with the savings provision in

[49] There is no merit to the suggestion (Pet. Br. 32 n.10; U.S. Br. 25 n.5) that § 332(c)(7)(B) contains an exhaustion requirement and thereby conflicts with § 1983. Section 332(c)(7)(B)(v) allows immediate suit upon "*any* final action or failure to act by a State or local government *or any instrumentality thereof*" (emphases added). Thus, once an instrumentality of local government has taken final action on a permit application, an adversely affected person may sue, without seeking further review from any other governmental entity. Petitioners seek to pour an exhaustion requirement into the statutory requirement of "final action," but well-settled principles of administrative law are to the contrary. *See Darby* v. *Cisneros*, 509 U.S. 137 (1993) (requirement of "final agency action" under Administrative Procedure Act does not require exhaustion prior to judicial review); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). "The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable .... [T]he finality requirement is concerned with whether the *initial decisionmaker* has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 192-193 (1985) (emphasis added). The reference in the Conference Report to "final administrative action" (H.R. Conf. Rep. No. 104-458, at 208 (1996)) is entirely consistent with this analysis, for it echoes the Court's language in *Williamson County*, requiring only a non-interim, binding ruling by an administrative decisionmaker, not exhaustion of administrative remedies. Additional evidence of Congress's intent comes from the fact that, just two years after enactment of § 332(c)(7)(B), eleven Senators sponsored a bill that would have replaced, in § 332(c)(7)(B)(v), "30 days after such action" with "30 days after *exhaustion of any administrative remedies* with respect to such action"—further indicating that, as enacted, § 332(c)(7)(B) contained no exhaustion requirement. S. 2514, 105th Cong. (1998) (emphasis added).

§ 601(c)(1) of the TCA. Under the title "No implied effect," § 601(c)(1) states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152 note, 110 Stat. 143. Along with two companion provisions directed to preserving the reach of federal antitrust and tax laws, § 601(c)(1) makes clear that the TCA should be construed in conformity, not conflict, with other federal statutes.

Petitioners' argument contravenes this principle. Its basic thrust is that rights secured by § 332(c)(7)(B) may be enforced only under § 332(c)(7)(B)(v) but not under § 1983—even though under this Court's settled jurisprudence, § 1983 is presumptively available for the enforcement of all federal rights created by Congress, absent clear indication by Congress to the contrary. Thus, under petitioners' construction, § 332(c)(7)(B)(v) would clearly "supersede" § 1983 as the avenue for enforcement of those rights, under the ordinary understanding of that term. It would also "modify" and "impair" § 1983 in this context, because it would make attorney's fees under § 1988 unavailable, even though Congress has tied the two statutes closely together on the understanding that attorney's fees are necessary to ensure effective vindication of federal rights. *See Thiboutot*, 448 U.S. at 11.

This Court's discussion of two wholly different savings provisions in *Sea Clammers* is not to the contrary. In *Sea Clammers*, the Court concluded that savings clauses in the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(5), preserved only substantive rights arising under other statutes or the common law, and did not preserve the right to sue under § 1983 for a violation of the pollution-control standards contained in the FWPCA and MPRSA themselves. *See Sea Clammers*, 433 U.S. at 20-21 n.31. As the Court explained, the FWPCA and MPRSA expressly limited the relief available in a citizen's suit to enforce those standards to injunctive relief, and it would have been peculiar for Congress to allow plaintiffs to avoid those

limitations simply by suing to enforce the very same standards under § 1983. *See id.* at 20.

Sea Clammers is thus an example of this Court's consistent jurisprudence with regard to savings clauses: a savings clause will not be read, in effect, to conflict with another provision in the statute to which it is attached. *See American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). No such concern is present in this case. As explained above (pp. 26-35), § 332(c)(7)(B) does not limit a plaintiff's remedies to injunctive relief. Accordingly, allowing a plaintiff to obtain damages through § 1983 would not undermine anything in § 332(c)(7)(B). Indeed, precluding a plaintiff from obtaining full relief, including damages and fees, would likely impair the effectiveness of § 332(c)(7)(B) because it would undermine much of the deterrent value of federal law in this context.

Nor is there merit to petitioners' argument that allowing a plaintiff to obtain damages for a violation of § 332(c)(7)(B) would impair *state* law, in contravention of § 601(c)(1) of the TCA. It has long been settled that municipalities may be liable in damages and required to pay attorney's fees if they violate individuals' federal rights. *See Franklin*, *supra* (damages remedy presumed appropriate for statutory violation); *Owen*, *supra* (rejecting municipal immunity under § 1983); *Thiboutot*, *supra* (holding that § 1988(b) applies to actions to enforce statutory rights). This is not an "impairment" of state law; it is simply an attribute of federal law. Nothing in § 332(c)(7)(B) purports to override any immunity that municipalities may have *under state law* for any violations *of state law* that they might have committed. Petitioners confuse our system of dual sovereignty with "impairment" of state law.[50]

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[50] This Court has long read savings provisions in federal statutes not to preserve state laws that *conflict* with federal law. *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 870-871 (2000); *United States* v. *Locke*, 529 U.S. 89, 106-107 (2000). To the extent that state municipal im-

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Congress enacted § 332(c)(7) because it determined that municipalities were improperly using their zoning authority to block the provision of wireless services to customers that find those services highly desirable. Under petitioners' proposed rule, a municipality could obstruct and delay free of cost—even if a federal court ultimately concludes that the municipality's denial of a permit for an antenna violated federal law. The cost to one such as Mr. Abrams, however, is very real indeed. In the telecommunications world, a year is a lifetime, but Abrams was forced to wait three years before his federal right to serve his customers was ultimately vindicated by the district court. Without full relief for that delay, the effectiveness of § 332(c)(7), for Abrams and others like him in the future, would be seriously undermined.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

munity laws would conflict with the application of § 1983—as petitioners seem to suggest they would—the savings provision in § 601(c)(1) would not preserve them.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

TITLE 28, UNITED STATES CODE

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

TITLE 42, UNITED STATES CODE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TITLE 42, UNITED STATES CODE

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

THE TELECOMMUNICATIONS ACT OF 1996, PUB. L. NO. 104-104, 110 STAT. 56

TITLE VI—EFFECT ON OTHER LAWS

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT.—

(1) AT&T CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) MCCAW CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS.—

(1) SAVINGS CLAUSE.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify,

impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL.—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking "Federal Communications Commission,".

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

(d) COMMERCIAL MOBILE SERVICE JOINT MARKETING.—Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

(e) DEFINITIONS.—As used in this section:

(1) AT&T CONSENT DECREE.—The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the

United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) GTE CONSENT DECREE.—The term "GTE Consent Decree" means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) MCCAW CONSENT DECREE.—The term "McCaw Consent Decree" means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94–01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

THE TELECOMMUNICATIONS ACT OF 1996,
PUB. L. NO. 104-104, 110 STAT. 56

TITLE VII—MISCELLANEOUS PROVISIONS

* * * * *

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY.—

"(A) GENERAL AUTHORITY.—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS.—

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and "(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).".

(b) RADIO FREQUENCY EMISSIONS.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93–62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY.—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent insists that 47 U.S.C. § 332(c)(7), a provision of the Communications Act entitled "Preservation of local zoning authority," should be read to impose the heavy burdens of damages and attorney's fees under Sections 1983 and 1988 for mistaken exercises of that authority. That contention is contrary to "[t]he crucial consideration" in this context: "what Congress intended." *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997); *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). The Communications Act's remedial scheme specifically addresses disputes like this one. It provides for administrative decisions at the state and local level, followed by an express cause of action for expedited judicial review. Respondent does not dispute many of the inconsistencies between that regime and enforcement under Section 1983—that Section 332(c)(7)(B)(v) imposes *mandatory* expedition, while Section 1983 does not; that Section 1983 (through 42 U.S.C. § 1988) imposes attorney's fees, and authorizes punitive damages against individual officers, while Section 332(c)(7)(B)(v) does not; and that Section 332(c)(7)(B)(v) requires "final action" by state or local authorities on a permit application as a precondition to judicial review, while Section 1983 does not.

Respondent does not deny that there is a dramatic inconsistency between the one- to six-year limitations periods generally applicable under Section 1983 and the 30-day limitations period applicable to Section 332(c)(7)(B)(v). His attempt to avoid that conflict by transplanting Section 332(c)(7)(B)(v)'s 30-day period to Section 1983 is textually unsupported; inconsistent with *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979); foreclosed by *Wilson* v. *Garcia*, 471 U.S. 261 (1985); and precluded by 28 U.S.C. § 1658, as recently construed in *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004). Even respondent's construction of the 1996 Act's savings clause, Section 601(c)(1), 110 Stat. 143, 47 U.S.C. § 152 (note), turns that provision on its head, converting it from an effort to preserve pre-existing state and federal laws into a mandate for expanded Section 1983 liability and the concomitant impairment of state zoning immunity laws.

* * * * *

First, it is necessary to correct a potential misapprehension about Section 332(c)(7). Respondent does not dispute the incongruity of construing a provision titled "Preservation of local zoning authority" to impose the heavy burden of Section 1983 liability (including fees under Section 1988) for every mistaken exercise of that authority.[1] Nor does he dispute this Court's reluctance to infer departures from past practice when construing statutes that, like Section 332(c)(7), bear on traditional state functions like zoning. Pet. Br. 41-42; *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 286 n.5 (2002). Instead, respondent (Br. 2-4, 7-8, 24-29) and his amici (CTIA Br. 1-2, 5-6) recharacterize Section 332(c)(7) as expressing hostility to zoning rules, which they dismiss as "NIMBYism" or "obstructionist."

That characterization is belied by the careful balance that Congress struck when it enacted Section 332(c)(7). Respondent's contrary view rests almost exclusively not on what Congress enacted, but on an FCC proposal that Section 332(c)(7) expressly *terminated* and a legislative amendment that Congress *rejected*. Wireless providers were dissatisfied with zoning law before 1996. Those generally applicable rules often imposed height restrictions or prevented the placement of commercial or industrial structures like antenna towers in certain locations (*e.g.*, residential neighborhoods). The wireless industry lobbied the FCC broadly to preempt local zoning authority, and an early draft of the 1996 Telecommunications Act, H.R. 1555, 104th Cong., 1st Sess. § 107(a) (1995), included such a proposal, accompanied by a Committee Report (quoted by the CTIA, Br. 6, 26), urging that "State and local regulation" be limited to the "minimum necessary." H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 94.

But Congress was *not* convinced; the proposal for expansive FCC preemption was *not* enacted; and, following consultation with local governments, Congress enacted 47 U.S.C. § 332(c)(7) to *preserve* "local zoning authority." That provision "prevents [the FCC] preemption" for which the CTIA had lobbied, ordering that the FCC proceeding be "terminated." Instead, it expressly "preserves the authority of State and local governments * * * except in the limited circumstances set forth." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996). It is difficult to reconcile *that* provision with the CTIA's suggestion (Br. 6-7) that Congress distrusted and "bold[ly]" moved to "federalize" zoning.

Section 332(c)(7) *does* impose certain federal standards to accommodate zoning to the necessities of wireless service. Pet. Br. 3-4, 18. But zoning law is otherwise *preserved*. State and local governments may "treat facilities that create different visual, aesthetic, or safety concerns differently," and may preserve the integrity of "residential district[s]." Pet. Br. 3-4; H.R. Conf. Rep. No. 458, *supra*, at 208. The hostility to zoning values and processes that respondent and his amici imply is impossible to reconcile with the requirement that wireless providers first submit permit applications through state and local administrative processes and obtain final action thereon before seeking judicial review. *Ibid.*; pp. 14-15, *infra*. "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests." *Ibid.* Far from being a pro-industry edict hostile to state interests, Section 332(c)(7) reflects a balance—a balance that would be upset by superimposing Section 1983 relief over the specific, tailored mechanism for judicial review that Congress provided in Section 332(c)(7) itself.

I. Section 1983 Enforcement Is Inconsistent With The Communications Act's Comprehensive Regime

The holdings of *Sea Clammers* and its progeny are not in serious dispute. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). Respondent

[1] Respondent relies (Br. 31 n.33) on the title of Section 704(a) of the 1996 Act, "National Telecommunications Wireless Policy." But that title does not identify the contents of that "National * * * Policy." The title of Section 332(c)(7)—which the Act inserts into the United States Code—does: "Preservation of local zoning authority."

urges (Br. 25) that the *Sea Clammers* standard be replaced with the novel rule that Section 1983 enforcement is always permissible unless Congress "(a) precludes compensatory damages or (b) imposes elaborate exhaustion requirements." But Congress need not preclude damages or use the word "exhaustion" to evince its intent to require resort to a more specific statutory review mechanism like Section 332(c)(7)(B)(v) instead of Section 1983. *Sea Clammers* and its progeny do not create a special rule about damages or exhaustion. They apply the principle that, where Congress imposes particular limits in a more specific statute, it does not intend for those restrictions to be circumvented or nullified by more general enactments. *Sea Clammers*, 453 U.S. at 20 ("The requirements of [a comprehensive] enforcement procedure may not be bypassed by bringing suit directly under § 1983."); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) ("specific statute will not be * * * nullified by a general one"); *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973).

Likewise, comprehensiveness is important *not* because the judiciary ought to decide how much relief is enough or that "more is better." State Amici Br. 15-17. Nor is the provision of "multiple enforcement options" for private parties and the government, Pub. Cit. Br. 10, significant for its own sake (although Congress delineated certain options here, see p. 6, *infra*). Rather, the "balance, completeness, and structural integrity" of a statutory scheme may be "inconsistent with the * * * contention that" it is "designed merely to supplement other * * * judicial relief." *Brown* v. *GSA*, 425 U.S. 820, 832 (1976).

Here, as in *Sea Clammers*, *Smith* v. *Robinson*, *Novotny*, and *Preiser*, the Communications Act's remedial scheme is "comprehensive in the relevant sense." *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (3d Cir. 2002). With respect to every potential violation, the Act provides "private judicial remedies that incorporate both notable benefits and corresponding limitations"—a balance that would be upset by permitting plaintiffs to bypass its remedial mechanism in favor of Section 1983. *Ibid.*

A. The Communications Act Establishes A Comprehensive Remedial Scheme

There is no dispute that the Communications Act establishes a "comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942); Pet. Br. 17. Nor is there any serious dispute that the Act establishes a similarly extensive remedial scheme that repeatedly matches each statutory duty with a corresponding mechanism for relief. Pet. Br. 24-25. Following that pattern, Section 332(c)(7) establishes both substantive requirements and the corresponding enforcement mechanism (administrative consideration followed by judicial review). Pet. Br. 25-26. The Act's comprehensive structure, which carefully pairs duties with remedial devices, shows that Congress in each instance "provided precisely" the remedial mechanism "it considered appropriate." *Sea Clammers*, 453 U.S. at 15.

Respondent urges that the Act's structure can be ignored because most of its provisions address "other" violations, while "only § 332(c)(7) addresses the harms at issue here." Resp. Br. 26 n.29. But the fact that Congress enacted a specific remedial mechanism to address *precisely* the conduct challenged here (and *different mechanisms* for *other* harms) reinforces the conclusion that Congress provided the enforcement mechanisms it deemed appropriate. Pet. Br. 27 n.8; *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 133 (2000) (court should not "confine itself to examining a particular statutory provision in isolation").[2] Even statutes that were

[2] Respondent's claim (Br. 26 n.29) that most Communications Act provisions address "private" conduct obscures the dramatic consequences of his position. State public utility commissions implement the federal interconnection and pricing mandates of 47 U.S.C. §§ 251, 252. *Iowa Util. Bd.*, 525 U.S. at 384-385. While Congress provided a mechanism for review of such state decisions, 47 U.S.C. § 252(e)(6), respondent would convert them into an occasion for Section 1983 actions against state commissioners, imposing *fee awards* against them whenever their decisions in this complex area are invalidated by declaratory or injunctive relief (without a qualified immunity defense). See *Hutto* v. *Finney*, 437 U.S. 678 (1978) (fee award permissible in official capacity suit); *Hewitt* v. *Helms*, 482 U.S. 755, 766 (1987) (qualified immunity no defense to declaratory or injunctive relief).

amended over time must be read as a whole. *Id.* at 143. Congress "expressly directed that the 1996 Act," including Section 332(c)(7), "be inserted into the Communications Act of 1934" and made "part of" that statute, making respondent's effort to read Section 332(c)(7) in isolation particularly inappropriate. *AT&T* v. *Iowa Util. Bd.*, 525 U.S. 366, 377, 378 n.5 (1999).

Respondent also overlooks the procedural detail in Section 332(c)(7)(B)(v). That provision establishes a system under which applications to build wireless facilities are first considered in state and local administrative processes. 47 U.S.C. § 332(c)(7)(B)(v) (review only of "final action or failure to act" at state or local level). It establishes standards for those processes. *E.g.*, 47 U.S.C. § 332(c)(7)(B)(iii) (written decisions "supported by substantial evidence" in "a written record"). It provides for judicial review of resulting decisions, subject to express limits (a 30-day limitations period) and requirements (mandatory expedition 47 U.S.C. § 332(c)(7)(B)(v). Finally, it provides those aggrieved by certain violations (improper consideration of radio frequency (RF) emission health effects) the alternative of "petition[ing] the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v); Pet. Br. 5, 38 n.12. The claim that Congress intended yet another alternative—suit under Section 1983—is at odds with the "balance, completeness, and structural integrity" of that remedial scheme. *Brown*, 425 U.S. at 832.[3]

B. The Mechanism For Private Judicial Remedies In Section 332(c)(7) Evidences Congress's Intent

The Communications Act, like the statutes in *Sea Clammers* and *Smith* v. *Robinson*, "provide[s] for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427. Indeed, as in

[3] The objection that Section 332(c)(7) does not provide details for FCC enforcement, or provides less detail for administrative processes than *Smith* v. *Robinson*, see Resp. Br. 21-25; Pub. Cit. Br. 5-6, 9-10, 12, is misplaced. The FCC does not generally enforce Section 332(c)(7) at the agency level (although the government may sue under 47 U.S.C. § 401), so no such details are necessary. Likewise, Congress in this case piggy-backed on pre-existing state administrative procedures for zoning disputes, making the detail of *Smith*—where Congress *created* the administrative process—unnecessary.

Smith v. *Robinson*, the Act provides private judicial remedies as part of a structure that begins with "local administrative review" and "culminate[s] in a right to judicial review." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990).

Respondent's claim that *Wright* does not mean what it says (Br. 23) ignores why *Wright*'s observation makes sense. The "rebuttable presumption" that statutes may be enforced under Section 1983 reflects the rule against presuming that "Congress has closed the avenue of effective judicial review." *Rosado* v. *Wyman*, 397 U.S. 397, 420 (1970). Where the underlying statute provides an express "avenue of effective judicial review," however, that presumption ceases to be relevant. The express statutory cause of action also meets Section 1983's purpose of providing "a federal remedy for the enforcement of federal rights." Pet. Br. 36. It is thus unsurprising that this Court has *never* held Section 1983 relief available for statutory violations where the underlying statute provides its own express mechanism for private judicial relief. Pet. Br. 34-36.

The United States (Br. 14-20) and the State Amici (Br. 7-12) make a persuasive case that the availability of an express mechanism for private judicial relief ordinarily forecloses resort to Section 1983.[4] There is nothing "paradoxical" about "determin[ing] that a § 1983 remedy is not available" where "Congress has made clear that it intended for there to be a private [judicial] remedy" through an express cause of action. Pub. Cit. Br. 11; see CTIA Br. 17-19. While the cause of action shows that Congress intended judicial enforcement, it also shows the conditions and limits that Congress intended to im-

[4] The claim that such a rule would eliminate Section 1983 claims for all statutory violations, CTIA Br. 16-17, 19; Pub. Cit. Br. 11, misreads *Gonzaga*. That decision compares the test for whether a statute creates the "rights" necessary to support Section 1983 enforcement with the *first* of *four* requirements for judicial implication of a cause of action. 536 U.S. at 283-285. It is thus not true that, whenever Congress creates "rights" under a federal statute, the statute will also have its own express or implied cause of action. Conversely, the provision of an express cause of action (*e.g.*, a citizen suit provision) does not show that the statute creates private rights necessary to support a Section 1983 action. State Amici Br. 28-30.

pose on such relief. Indeed, where a statute already expressly provides for judicial review, permitting suit under Section 1983 adds nothing *except* relief that Congress chose not to provide, or a means of bypassing the restrictions on review that Congress imposed. Even if the provision of a specific judicial remedy is not *conclusive* by itself, *Wright* makes clear that it *supports* the conclusion that Congress intended enforcement through that mechanism rather than Section 1983.

II. Enforcement Under Section 1983 Is Incompatible With Section 332(c)(7)(B)(v)

A. Inconsistent Limitations Periods

Respondent does not dispute that Section 332(c)(7)(B)(v)'s 30-day limitations period and mandatory expedition are critical to Congress's effort to provide rapid dispute resolution for public benefit. Nor does he deny that allowing Section 1983 actions under longer limitations periods—whether the four-year period under 28 U.S.C. § 1658, or the one- to six-year periods for personal injury otherwise borrowed from state law under *Wilson* v. *Garcia*—would be dramatically inconsistent with the balance struck in Section 332(c)(7)(B)(v). Instead, respondent attempts to eliminate that conflict by urging the Court to transplant the 30-day limitations period in Section 332(c)(7)(B)(v) to Section 1983 for claims that (like his) assert Communications Act violations, while borrowing limitations periods from state law for other Section 1983 suits. That argument is foreclosed by text, precedent, and a federal statute.

1. Respondent and his amici do not seriously suggest that the 30-day limitations period Congress attached to the independent cause of action in Section 332(c)(7)(B)(v) applies, by its own terms, to Section 1983 claims. "Federal statutes of limitations * * * are almost invariably tied to specific causes of action," not the underlying "rights" or "interests." *Agency Holding Corp.* v. *Malley-Duff & Assoc.*, 483 U.S. 143, 168 (1987) (Scalia, J., concurring); cf. *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687, 726 (1999) (Scalia, J., concurring) (jury-trial right "determined by the federal cause of action [Section 1983] and not by the innumerable constitutional and

statutory violations upon which that cause of action is dependent"). Section 332(c)(7)(B)(v) follows that pattern: It provides that "[a]ny person adversely affected by any final action or failure to act * * * may * * * commence an action," a classic formula for "the conferral of a private [cause] of action." *Verizon Maryland, Inc.* v. *Maryland Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002); Pet. Br. 26, 33. Section 332(c)(7)(B)(v) then conditions the cause of action thus created, stating that it must be filed "within 30 days after" the challenged state or local government's "final action or failure to act."

Although respondent suggests that Section 332(c)(7)(B)(v)'s limitations period applies to any "claim *to enforce the rights* set forth in § 332(c)(7)(B)," or is "attached to the federal *right* at issue," Resp. Br. 43, 45, that is not what Section 332(c)(7)(B)(v) says. That provision attaches the limitations period to the cause of action it creates. Congress could have departed from tradition and attached Section 332(c)(7)(B)(v)'s 30-day limitations period to putative statutory "rights." It did not.

Novotny and *Sea Clammers* all but foreclose the contrary view. In *Novotny*, 442 U.S. at 374 n.13, Title VII used virtually indistinguishable language to create a cause of action and accompanying limitations period, declaring that, "within ninety days," a "civil action may be brought * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). This Court did not read that provision to establish a limitations period for Section 1985(1) claims where Title VII provides the underlying rights. Instead, the Court borrowed state law. Indeed, the Court held that, *because* the borrowed state-law limitations period could be as long as six years, allowing Title VII violations to be asserted under Section 1985(1) "would grossly alter[]" Title VII's "short and precise time limitations." 442 U.S. at 376 & n.10. The statutes in *Sea Clammers* used similar language to create a cause of action, 453 U.S. at 6, 7 & nn.9, 11, and broader language to provide that "[n]o action may be commenced" without 60 days' prior notice, *id.* at 6, 8, 14 & nn.9, 11. As in *Novotny*, this Court read those limits to apply only to the *causes of action* those statutes created, holding that suit under Section 1983 would

allow plaintiffs to avoid them. Because *Novotny* addressed limitations periods, those cases cannot be distinguished (Resp. Br. 45) as addressing other "procedural restrictions."

2. Respondent primarily asserts that the limitations period for Section 1983 claims in this case should be "borrowed" from Section 332(c)(7)(B)(v). Resp. Br. 45. But the effort to "borrow" a limitations period for Section 1983 claims from Section 332(c)(7)(B)(v) is also inconsistent with *Novotny*, which did not "borrow" Title VII's 90-day period and apply it to Section 1985(1). Rather, it concluded that much longer state periods would apply to Section 1985(1) suits enforcing Title VII rights, upsetting the careful time limits in Title VII.

More fundamentally, respondent's proposal to borrow federal limitations periods selectively for certain Section 1983 claims is foreclosed by *Wilson* v. *Garcia*, 471 U.S. 261 (1985). In that case, this Court chose between holding that "*all* § 1983 claims should be characterized in the same way for limitations purposes," *id.* at 271 (emphasis added), and a rule requiring courts to select a limitations period in light of the "factual circumstances and legal theories" underlying the claims, *id.* at 261. Recognizing the diverse claims maintainable under Section 1983, *id.* at 273-274, the Court held that Section 1983 claims "are best characterized as personal injury actions," and that federal courts should borrow the state personal injury limitations period. *Id.* at 280. The Court explained that "a simple, broad characterization of *all* § 1983 claims best fits the statute's remedial purpose" and avoids "uncertainty." *Id.* at 262 (emphasis added). The Court *expressly* addressed the fact that some § 1983 claims "are based on statutory rights, *Maine* v. *Thiboutot*, 448 U.S. 1, 4-8 (1980)," but found an across-the-board rule appropriate nonetheless. *Wilson*, 471 U.S. at 278. Respondent's suggestion that *Wilson* applies only to constitutional claims (Br. 46) is thus without foundation.

Respondent's proposal to judicially subdivide the Section 1983 cause of action so that it sometimes borrows a limitations period from state law and other times from federal law, based on the nature of the underlying rights, is unprecedented. This Court has "declined in other contexts to classify § 1983 actions

based on the nature of the underlying right asserted." *Del Monte Dunes*, 526 U.S. at 711 (plurality); *id.* at 725 (Scalia, J., concurring) (*Wilson* "concluded * * * that all § 1983 claims should be characterized in the same way."). Respondent cites no case in any context that adopts multiple limitations periods for a single cause of action based on the underlying violations.[5] The proposal would eviscerate *Wilson*, introducing the uncertainties and anomalies it sought to avoid.[6]

To the extent respondent asserts (Br. 45-46) that 42 U.S.C. § 1988 requires the Court to borrow a limitations period from federal law, that argument too defies precedent. *Wilson* expressly held that the governing *federal principle* that must be applied under Section 1988 is the longstanding and "settled practice" that limitations periods for federal statutes lacking their own will be drawn from an analogous *state law*—an approach "Congress implicitly endorsed * * * with respect to

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[5] While respondent relies (Br. 44 n.45) on *Malley-Duff*, 483 U.S. at 150, that case rejects his approach. *Malley-Duff* borrowed the limitations period for RICO from the Clayton Act—the statute upon which RICO was modeled—but *rejected* the argument that RICO's limitations period should depend on the underlying violations or predicate acts (*e.g.*, mail fraud). The court explained that, "for reasons similar to those expressed in *Wilson* v. *Garcia*," for RICO "as with § 1983, a *uniform* statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' *Wilson* v. *Garcia*, 471 U.S. at 272." 483 U.S. at 149-150 (emphasis added).

[6] Under respondent's theory, "[m]ultiple periods of limitations" would apply to Section 1983 claims in "the same case," 471 U.S. at 274 & n.33. Here, respondent's statutory claims under Section 1983 would be governed by the 30-day limit of Section 332(c)(7)(B)(v), while his Section 1983 due process claim would be governed by California's (now) two-year limitations period for personal injury. Moreover, Section 332(c)(7)(B)(v)'s 30-day limit is not appropriate for Section 1983. Section 332(c)(7)(B)(v) creates a cause of action for review of agency action, which is distinct from (and typically governed by shorter limitations periods than) the tort actions to which this Court has analogized Section 1983. This Court repeatedly has rejected efforts to impose similar limitation periods on Section 1983 in light of the statute's remedial purposes. *Felder* v. *Casey*, 487 U.S. 131, 141-149 (1988) (120-day notice-of-claim statute); *Burnett* v. *Grattan*, 468 U.S. 42, 49-55 (1984) (six-month period for administrative complaints). By endorsing a 30-day period for Section 1983, respondent's amici (*e.g.*, Pub. Cit. Br. 15) undermine the civil rights interests they purport to serve.

claims enforceable under the Reconstruction Civil Rights Acts." 471 U.S. at 266-267; *R.R. Donnelley & Sons*, 124 S. Ct. at 1839, 1842-1843. "Recognizing the problems inherent in the case-by-case approach, [*Wilson*] determined that *42 U.S.C. § 1988 requires* courts to borrow and apply to *all* § 1983 claims the one most analogous state statute of limitations." *Owens* v. *Okure*, 488 U.S. 235, 240 (1989) (emphases added).

Respondent's reliance on *Lampf, Pleva, et al.* v. *Gilbertson*, 501 U.S. 350 (1991), see Resp. Br. 44; CTIA Br. 21, is misplaced. *Lampf* concerned the limitations period for a judicially implied right of action for violations of the Securities Exchange Act. The *Lampf* plurality expressly acknowledged that, for *Section 1983* actions, *Wilson* v. *Garcia* had selected "a single variety of state actions" for "borrowing purposes," "characterizing *all* actions under 42 U.S.C. § 1983 as analogous to a state-law personal injury action." 501 U.S. at 357 (plurality opinion) (emphasis added). Justice Scalia's concurring opinion—providing the critical fifth vote—specified that, for express causes of action lacking "a congressionally created limitations period," such as Section 1983, "state periods govern." *Id.* at 364-365; accord *id.* at 368 (Stevens, J., dissenting). There is no basis for overruling *Wilson* here.

3. The proposal to borrow a limitations period at all, moreover, is foreclosed by 28 U.S.C. § 1658. Congress enacted that provision to address the "vast amount of litigation" that had been spawned by the absence of express limitations periods for many federal statutes. *R.R. Donnelley & Sons*, 124 S. Ct. at 1843. Section 1658 creates a prospective limitations period applicable to certain federal causes of action lacking their own: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." In *R.R. Donnelley & Sons*, this Court gave that "arising under" formulation a broad construction, holding that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations period—if the plaintiff's claim against the defendant *was made possible* by a post-1990 enactment." 124 S. Ct. at 1845. Respondent does not dispute that his Section 1983 "claim was made possible by a post-1990 enactment"—the Telecommunications Act of 1996.

Respondent urges that Section 1658 is inapplicable because the limitations period for his Section 1983 claim is "otherwise provided by law." Resp. Br. 43-44. But the phrase "otherwise provided by law" establishes that Section 1658's limitations period is a catch-all and does not apply where a federal cause of action provides its *own* limitations period. Respondent concedes that Section 1983 does not contain its own limitations period, Resp. Br. 42, and Section 332(c)(7)(B)(v) does not by its terms purport to provide a limitations period directly applicable to Section 1983, see pp. 8-10, *supra*. Respondent thus appears to read "[e]xcept as otherwise provided by law" to mean "except as might be achieved by borrowing from other sources." Resp. Br. 45. But that defeats Section 1658's purpose: It was precisely that sort of *ad hoc* borrowing that Section 1658 sought to avoid. 124 S. Ct. at 1844.[7]

B. Mandatory Expedition

Respondent agrees that Section 1983, unlike Section 322(c)(7)(B)(v), does not mandate expedition, but he urges that Section 1983 does not foreclose expedition. Resp. Br. 33 n.36. There is, however, a critical difference between the *mandatory* expedition required by Section 332(c)(7)(B)(v) and discretionary expedition under Section 1983. Mandatory expedition *ensures* that localities receive prompt resolution of land-use disputes, which can affect related development projects. And it promotes the public interest in rapid deployment of wireless technology. Pet. Br. 28-29; NLC Br. 20. Allowing suits under Section 1983 rather than Section 332(c)(7)(B)(v) would free

[7] Respondent's tacit suggestion (Br. 43) that Section 332(c)(7)(B)(v)'s limitations period must apply if his claim "arises under" the 1996 Act within the meaning of 28 U.S.C. § 1658 is unpersuasive. The limitations period in Section 332(c)(7)(B)(v) does not attach to claims "arising under" the 1996 Act as expansively construed in *R.R. Donnelley & Sons*. Rather, as is "almost invariably" the case, *Malley-Duff*, 483 U.S. at 168, Section 332(c)(7)(B)(v) attaches the limitations period to the *cause of action* it creates.

parties and courts of that mandate. *Nextel*, 286 F.3d at 695. Respondent's effort to cast doubt on the efficacy of mandatory expedition merely second-guesses Congress's judgment.

C. Final Administrative Action

Enforcement under Section 1983 would permit plaintiffs to bypass another important feature of Section 332(c)(7)(B)(v). Section 332(c)(7)(B)(v) defers judicial review pending a "final action or failure to act," 47 U.S.C. § 332(c)(7)(B)(v)—which "means final administrative action at the State or local government level" on an application to construct or modify a wireless facility. H.R. Conf. Rep. 458, *supra*, at 208; *Nextel*, 286 F.3d 692. That is important: State administrative processes introduce "flexibility," allow consideration of individualized circumstances and compromise, and thus minimize the likelihood of lawsuits. Pet. Br. 32 n.10 (citing treatises); U.S. Br. 25 n.5; cf. *Weinberger* v. *Salfi*, 442 U.S. 749, 765 (1975) (benefits of awaiting administrative decision). Because Section 1983 does not require that plaintiffs "first seek relief in a state forum," 411 U.S. at 489—it is subject only to unpredictable ripeness rules—allowing suit under Section 1983 here would, as in *Preiser* and *Smith* v. *Robinson*, 468 U.S. at 1011 n.14, threaten bypass of an important precondition to suit. Pet. Br. 32 n.10.

Respondent concedes (Br. 47 n.49) that Section 332(c)(7)(B)(v) provides judicial review only after "final action on a permit application." But he argues that *exhaustion* of administrative remedies (*e.g.*, internal appeals) is not required. That is no answer. At a minimum, Section 332(c)(7)(B)(v) requires the plaintiff to submit an application to and await the decision of some state or local body; Section 1983 does not. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984) ("presentment" requirement). Nor is it clear that exhaustion is optional. Respondent relies (Br. 47 n.49) on the holding in *Darby* v. *Cisneros*, 509 U.S. 137 (1993), that the APA's "final" decision requirement does not *itself* require exhaustion. But administrative exhaustion is a universal requirement of state zoning laws. 4 Kenneth H. Young, *Anderson's American Law of Zoning* § 27.28, at 593-599 (4th ed. 1996). *Darby* makes it

clear that exhaustion *is* required if the *underlying* law or agency rules make exhaustion a precondition to finality and review. 509 U.S. at 147.[8]

D. Relief Under Section 1983

Respondent concedes two inconsistencies between the relief available under Section 332(c)(7)(B)(v) and Section 1983. First, although Congress authorized attorney's fee awards in other provisions of the Communications Act, it did not provide fees in Section 332(c)(7)(B)(v). In contrast, Section 1983, through Section 1988, authorizes fee awards. While respondent downplays that conflict, his argument would override Congress's choice not to provide fees in Section 332(c)(7) itself. The claim that awards should be reasonable, moreover, ignores the tremendous burden that even putatively "reasonable fees" impose, an effect that is aggravated by the enormous number of new and proposed wireless towers and resulting permit applications (23,000 in 2003). See NLC Br. 21-23; Pet. Br. 30-32. The threat of fees for each good-faith denial of those applications fuels litigation and undermines the ability of state and local officials to enforce the zoning requirements Congress expressly sought to preserve—particularly where smaller municipalities confront well-funded wireless companies (including respondent's). *Ibid.*[9] Second,

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[8] Respondent errs in relying (Br. 47 n.49) on a failed legislative proposal to mandate exhaustion expressly. Its non-adoption is equally consistent with the conclusion that no change was necessary because "the existing legislation already incorporated the offered change." *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 188 (1994).

[9] *Nextel*, 286 F.3d at 695; *PrimeCo PCS (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003); Pet. 26-27 n.7 (collecting cases). Respondent's effort to portray himself as the little guy is belied by his own public statement: "[W]hat [city officials] fail to realize is I have more money to fight them than they have to fight me." Green, *Antennas Make Waves in RPV*, Daily Breeze, Mar. 17, 2002. The related claim that many antenna owners are small businesses, Resp. Br. 35 n.8; AMTA Br. 3, appears to rest in part on an oral statement; may not distinguish between the CMRS antennae covered by the Act and private antennae for other purposes; and ignores the backing *wireless providers*—ordinarily multi-billion dollar businesses—may supply where they wish to use a particular antenna.

respondent concedes that punitive damages are not available under Section 332(c)(7)(B)(v) but are available against individual officers under Section 1983. The threat of such extraordinary liability, even if unlikely, distorts the balance Congress established in Section 332(c)(7)(B)(v).

Respondent's insistence that both Section 1983 and Section 332(c)(7)(B)(v) provide for compensatory damages is unpersuasive. Respondent never sought damages under Section 332(c)(7)(B)(v). App., *infra*, 1a-11a. While respondent characterizes the damages issue as the City's "principal argument," Resp. Br. 26, the City prefaced its brief footnote on that issue with the disclaimer that "the Court need not resolve the issue here," Pet. Br. 38 n.12. And respondent's claim that damages are "necessary" to effectuate Section 332(c)(7) is belied by history. Zoning requirements have long been judicially enforced without the threat of damages. Likewise, courts have long provided effective judicial review of administrative action through specific relief alone. Pet. Br. 42; U.S. Br. 16 n.2.

Respondent insists that "any appropriate relief" under *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), includes damages for every statutory violation. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002), holds otherwise, specifying that "appropriate" means "traditionally available," with specific reference to the nature of the underlying dispute. Respondent does not deny that, for land-use and zoning disputes, the traditional remedy is specific relief—such as an order requiring that the disputed permit be granted. Pet. Br. 42; NLC Br. 14-17. While respondent urges (Br. 29) that *Barnes* is irrelevant to "legislation not enacted under the Spending Clause," *Barnes*'s defies that distinction.[10]

[10] Respondent's reliance (Br. 27, 30) on Section 1983 cases—such as *Carey* v. *Piphus*, 435 U.S. 247 (1978)—to allege the importance of damages under Section 332(c)(7)(B)(v) is wholly circular. The fact that damages are traditionally available under Section 1983 does not prove that they are appropriate under a separate cause of action for review of administrative action under the Communications Act. In this context, the traditional remedy of specific relief is quick and complete. Pet. Br. 38-39.

Respondent, moreover, fails to address the other overwhelming evidence that Congress did *not* intend to permit damages awards under Section 332(c)(7)(B)(v). *First*, the FCC has interpreted Section 332(c)(7)(B)(v), which authorizes the FCC to grant relief from zoning decisions that consider RF emissions, as not providing for damages. Pet. Br. 5, 26, 38 n.12. Respondent does not explain why the adjacent option of seeking relief in court should be construed differently. *Second*, respondent ignores the legislative history of Section 332(c)(7)(B)(v), which describes that provision as an "appeal," and "judicial review of agency action," which traditionally do not offer damages. See Pet. Br. 38 n.12, 43. *Third*, respondent says nothing about Section 332(c)(7)(B)(v)'s use of the phrase "hear and decide," a phrase that in the zoning context typically describes an appellate function. Pet. Br. 43 & n.13.

Fourth, respondent's position conflicts with the Act's savings clause, 1996 Act § 601(c)(1), 47 U.S.C. § 152 (note). That provision declares that, absent an *express* direction to the contrary, the Act should not be construed to "modify, impair, or supersede" "state" or "local" law. Section 332(c)(7)(B)(v) does not expressly provide for damages. Providing damages for zoning and land-use decisions under Section 332(c)(7)(B)(v) would preempt—and thus "impair" and "supersede"—myriad state laws that afford localities and their officers immunity for such decisions. Pet. Br. 38-39 n.12, 41-43, 45; p. 20, *infra*.

E. Respondent Ignores Congress's Evident Intent

Respondent cannot dispute that imposing fees (and damages) for otherwise good-faith zoning decisions would radically depart from prior practice in this area of traditional state authority. Pet. Br. 41-43, 45. Instead, respondent urges that Congress "clearly departed from state law in enacting § 332(c)(7)(B)(v)" because Section 332(c)(7) imposes substantive requirements, *e.g.*, it proscribes zoning laws that effectively prohibit wireless service.

That misconstrues the City's argument. No one suggests that Section 332(c)(7) left substantive zoning law unchanged. Rather, it is the *procedures* that Section 332(c)(7) provides for

obtaining review that emulate critical features of virtually every state zoning law: initial administrative decisions by state and local authorities; review of "final" administrative action or failure to act; a short limitations period; standing for any person "adversely affected"; and the substantial evidence test. Pet. Br. 42-43; NLC Br. 8-12. Those extensive procedural similarities make it unlikely that Congress intended to displace the nearly universal form of relief—specific relief according the plaintiff the thing to which the statute entitled him—with damages and fee awards under Section 1983.[11]

That result also would be at odds with Congress's stated intent to "not limit or affect the authority of a State or local government" except as expressly provided. It would defy Section 332(c)(7)'s clear instruction—and common sense—to conclude that state and local zoning authority is somehow "preserved" by subjecting those decisionmakers to liability that is foreign to traditional zoning schemes. While respondent (Br. 35-36) dismisses that as a "policy" argument, the issue is not "policy" but *congressional intent*. The imposition of potentially massive fees liability under Section 1983 would contravene Section 332(c)(7)'s purpose and distort the balance it establishes. See pp. 15-16, *supra*; Pet. Br. 29-32.

Respondent's claim (Br. 36-37) that state and local governments may behave lawlessly absent the threat of fee awards is baseless. Congress did not accept that supposition, for it channeled permit requests through those very governments and declined to provide fee awards in Section 332(c)(7)(B)(v), even as it provided for that relief in other sections of the Communications Act. The assertion is in serious tension with respon-

[11] Respondent errs in relying (Br. 34) on a 1992 Amendment to the Cable Act, Pub. L. 102-385. That amendment was prompted by the assertion of *constitutional* claims against municipalities for franchising decisions "even when fully consistent" with the Cable Act. S. Rep. No. 102, 92d Cong., 2d Sess. 49 (1992). Congress therefore protected franchising authorities from damages liability under Section 1983 "for acts that *are authorized under title VI of the 1934 Act*." *Ibid.* (emphasis added). That provision has no bearing on whether Congress intended to make Section 1983 relief available for the alleged *statutory* violations at issue here.

dent's own representations that local governments approve "92 percent of applications, * * * most within 60 days," and that they "have learned to compromise to accommodate both the needs of providers and the preferences of local communities." Br. in Opp. 20. In any event, judicial review of zoning decisions, and judicial review of agency action generally, have long functioned effectively without fee awards. There is no statutory basis for concluding that Congress believed that traditional relief to be insufficient here.[12]

III. The Savings Clause Defeats Respondent's Arguments

Respondent's construction of Section 601(c)(1), 47 U.S.C. § 152 (note), assumes the very conclusion—the availability of Section 1983 relief—that it sets out to prove. Respondent contends that, unless the Communications Act's requirements are enforceable under Section 1983, then the Act somehow "impairs" Section 1983. But respondent offers no answer to the Third Circuit's explanation that Congress's refusal to create Communications Act rights that are enforceable under Section 1983 does not "impair" Section 1983; it merely declines to *expand* the categories of claims that can be raised under that provision. Pet. Br. 49-50.

Respondent likewise nowhere distinguishes *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004), in which this Court construed strikingly similar language in an antitrust-specific savings provision to leave pre-existing law unchanged. Pet. Br. 50; see *Cellco P'Ship* v. *FCC*, 357 F.3d 88, 91 (D.C. Cir. 2004) (Section 601(c) designed to protect pre-existing law). Nor does he

[12] While the CTIA (Br. 26-29) purports to identify five cases involving municipal misconduct, those cases do not hold up on close inspection. Five alleged cases in the *eight years* following the Acts' effective date hardly justifies fee awards for *every* mistaken application of the Act's complex requirements. Moreover, wireless companies themselves have overreached. *E.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (finding "untenable" Sprint's claim that it "has the right * * * to construct any and all towers that, in its business judgment, it deems necessary"); *Town of Amherst* v. *Omnipoint*, 173 F.3d 9, 15 (1st Cir. 1999) (noting provider's intransigent "one-proposal strategy").

answer *Novotny*, 442 U.S. at 376-377, which rejected an argument (under the rubric of implied repeal) indistinguishable from respondent's. Pet. Br. 50. Finally, respondent's effort to distinguish *Sea Clammers* (Br. 48-49) is no more persuasive than the Ninth Circuit's. Pet. Br. 47-48.

Section 601(c), moreover, provides that the Communications Act shall not be read to "impair" or "supersede" *state and local* law except as "*expressly so provided.*" It thus prevents federal preemption or impairment of state law unless Congress makes its intent express. Expanding Section 1983 liability to this new context clearly would preempt (and thus supersede)—for a whole new category of cases—the many state immunity laws that otherwise protect municipalities and their officers from liability for zoning decisions. Pet. Br. 44-45 & App. 25a-35a. It likewise would impair their purpose by preventing them from protecting the government fisc for public benefit and ensuring that individuals are willing to serve on zoning commissions (and rule evenhandedly) without fear of monetary liability. *Humana* v. *Forsyth*, 525 U.S. 299, 310 (1999) ("impair" encompasses "frustrat[ion]" of "state policy"). Respondent's veiled suggestion that all of those immunity laws apply only to *state law* claims (Br. 49), is unsupported by citation, has no basis in text, and is belied by numerous cases addressing whether the application of such limits to federal claims is preempted by federal law. *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) ("state law that immunizes government conduct" is "preempted" by Section 1983); *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003); *Howlett* v. *Rose*, 496 U.S. 356, 377-379 (1990); Pet. Br. 44. Nor is there any basis for asserting that such preemption is not an "impairment" of state law, but rather "an attribute of federal law." Br. 49. It is both: Under the Supremacy Clause, one attribute of federal law is that it preempts inconsistent state laws—except where, as here, Congress expressly directs otherwise.

* * * * *

For the foregoing reasons and those set forth in the City's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2005

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-09071-SVW (RNBx)

MARK J. ABRAMS,
Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES PLANNING COMMISION; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY;
Defendants and Respondents.

[February 25, 2002]

PLAINTIFF/PETITIONER'S BRIEF RE: REMEDIES AND DAMAGES

Pursuant to the Court's order of January 9, 2002, Plaintiff/Petitioner MARK J. ABRAMS hereby submits his Brief with respect to the issue of appropriate remedy and damages.

1. INTRODUCTION

On January 9, 2002, this court issued its *Order Granting Petition to Vacate Defendants' Decision to Deny Plaintiff a Conditional Use Permit ("Order Granting Petition")*, wherein it was determined that the defendant/respondent CITY OF

RANCHO PALOS VERDES ("RPV" or the "CITY") had violated the Telecommunications Act of 1996 ("TCA") by denying plaintiff/petitioner MARK J. ABRAMS' application for a conditional use permit ("CUP") to use the antenna facilities already legally existing on his property for transmission on certain commercial, as well amateur, radio frequencies. The court directed the parties to submit further briefing with respect to the appropriate remedy in this case, as well as the issue of damages under 42 U.S.C. § 1983.

It should be noted here that plaintiff's complaint alleges several separate and distinct claims for relief. Insofar as is relevant here, the first claim for relief alleges defendants' violation of the TCA, and seeks equitable relief in the form of mandamus or injunction to compel defendants to issue the CUP to plaintiff forthwith. The third claim for relief is to recover damages under 42 U.S.C. § 1983, including all lost profits and income due to plaintiff's inability to utilize and provide the wireless telecommunications facility proposed by the CUP. Related to plaintiff's Section 1983 claim is his claim for attorney's fees under 42 U.S.C. § 1988(b).

2. PLAINTIFF IS ENTITLED TO IMMEDIATE INJUNCTIVE RELIEF

Plaintiff's complaint herein prays, in part, that defendant CITY be ordered to forthwith issue to plaintiff the CUP in question, and for a writ of mandate to issue, commanding the CITY to forthwith and unconditionally issue the CUP as applied for by plaintiff. As the court has noted in its *Order Granting Petition*, the court has the authority, either via mandamus or injunction, to fashion an appropriate remedy under the TCA.

Indeed, most cases decided under Section 332(c)(7) of the TCA that favor the party attempting to construct an antenna have compelled the municipality to issue the necessary permits to allow construction of the antenna. The Court cites two such cases on page 20 of its *Order Granting Petition: Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997) (permitting mandamus to be issued) and

Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (finding appropriate relief under the Act was an injunction). Several other courts have also used an injunction as the proper relief for violation of Section 332(c)(7). See *New Par d/b/a Verizon Wireless v. City of Saginaw*, 161 F.Supp.2d 759, 771 (E.D. Mi. 2001) (issued mandatory injunction as the appropriate remedy); *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403, 410 (3rd Cir. 1999) (injunction is proper form of relief under §332(c)(7)(B)(v)); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999) ("appropriate remedy is injunctive relief in the form of an order to issue the relevant permits"); *Sprint Spectrum, L.P. v. Town of Easton*, 982 F.Supp. 47, 52 (D. Mass. 1997) (ordering injunction directing defendant to issue Special Permits). Courts have also found writs of mandamus to be a proper remedy. See *Western PCS II Corporation v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230, 1237 (D.N.M. 1997) (mandamus relief was appropriate where there had been considerable municipal delay); *Bellsouth Mobility Inc. v. Gwinnett County, GA*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (TCA gives courts sufficient authority to issue mandamus relief "if such relief would be warranted under the circumstances").

The overriding theme in all of these cases, whether issuing an injunction or mandamus relief, is that the TCA calls for prompt decisions regarding cases decided under Section 332(c)(7) and the only way to ensure expedited action is to issue an injunction or writ of mandamus compelling the municipality to issue the necessary permits to the prevailing party. ABRAMS, as noted *infra*, has had this case pending for over 18 months, during which time competitive wireless service has been unavailable to the public. Moreover, the present case offers an even more compelling reason for immediate injunctive or mandamus relief. Unlike all the cases cited above, no construction is necessary to implement ABRAMS' proposal. The court has already recognized this fact in its decision. *Order Granting Petition*, at pgs. 10, 12. Thus, there is nothing for the CITY to approve and no remand

is necessary. Indeed, the courts that have considered the matter under similar circumstances (but where cellular facilities were to be constructed atop an existing support structure) have generally found that remand would be inappropriate. As stated in *Cellular Telephone Co. v. Town of Oyster Bay, supra:*

> "Given the weight of authority that injunctive relief best serves the TCA's stated goal of expediting resolution of this type of action [Citation], and our agreement with the District Court that remand would serve no useful purpose in this case [Citation], we hold that an injunction ordering the Town to issue the permits was an appropriate remedy." (166 F.3d at 497).

Also see *New Par d/b/a Verizon Wireless v. City of Saginaw, supra*, 161 F.Supp.2d at 771 ("a remand would serve no useful purpose and would only be the occasion for further delay"); *Bellsouth Mobility Inc. v. Gwinnett County, GA, supra*, 944 F. Supp. at 929 ("simply remanding the matter to the Board for their [further] determination would frustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"); *Illinois RSA No. 3, Inc. v. County of Peoria, supra*, 963 F. Supp. at 746 (remand of case to the local zoning board would be a "waste of time and frustrate the TCA's direction to expedite these proceedings"); *Western PCS II Corporation v. Extraterritorial Zoning Authority, supra*, 957 F. Supp. at 1237 (remand inappropriate where the record indicates that the zoning authority "is willing to ignore the requirements of federal law and reach far beyond its authority to create a reason to deny the Petitioner's request."); and *Sprint Spectrum, L.P. v. Town of Easton, supra*, 982 F.Supp. at 52 (appropriate remedy is injunction compelling defendant to issue Special Permits, rather than remand).

As the court herein acknowledges that the TCA requires that remedies thereunder be effected on an expedited basis, plaintiff submits that the court should, first of all, forthwith make and enter a judgment ordering defendant CITY to immediately and unconditionally grant plaintiff's application for CUP 207, and to issue the CUP accordingly.

3. PLAINTIFF IS ENTITLED TO RECOVER DAMAGES UNDER 42 U.S.C. § 1983.

The court has directed the parties to further brief "the issue of damages pursuant to 42 U.S.C. § 1983". Plaintiff is not sure if this further briefing is to discuss the nature and extent of plaintiff's damages, or whether plaintiff is entitled to recover damages in the first instance. Plaintiff has already briefed the issue concerning his entitlement to damages, concluding that "this matter should be set for further briefing and/or an evidentiary hearing to determine the nature and amount of damages which plaintiff is entitled to recover"; see Part IV of Plaintiff/Petitioner's Opening Brief. However, defendants declined to address the issue of damages at all in their brief; see Part VII to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Opening Brief. Moreover, the court has not ruled, in its *Order Granting Petition*, whether or not plaintiff is in fact entitled to recover Section 1983 damages.

As noted in Plaintiff's Opening Brief, case law supports the proposition that a denial of rights under the TCA, and specifically Section 332 thereof, is protected by 42 U.S.C. § 1983. A few cases in particular merit further discussion. In *Sprint Spectrum, L.P. v. Town of Easton, supra.*, the court found that the Town of Easton had violated Section 332 of the TCA. The court also decided that the Town violated 42 U.S.C. § 1983 by denying Sprint its rights under the TCA. The court followed the Supreme Court's interpretation of Section 1983, in which enforcement of a federal right through Section 1983 will be denied only if the statute at issue precludes a Section 1983 action, or if the statute does not create a substantive right. The court stated that the TCA does not explicitly or implicitly preclude Section 1983 suits. Also, the TCA creates substantive rights by "providing that 'any person adversely affected by any final action . . . by a . . . local government or any instrumentality thereof . . . may . . . commence action in any court of competent jurisdiction." *Sprint Spectrum* at 53 (citing 47 U.S.C. §332(c)(7)(B)(v)). Moreover, the court stated

that enforcing a plaintiff's rights under the TCA would not strain judicial competence.

The U.S. District Court of Connecticut has also found that a violation of 332(c)(7) is enforceable under Section 1983. In *Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the court concluded that the Town had violated Section 332(c)(7)(B)(iii) by not supporting its decision with substantial evidence. The court concluded that a Section 1983 claim was available to Smart SMR. The court analyzed the case in the same manner as the *Sprint Spectrum* court and agreed with the *Sprint Spectrum* court's analysis that violations of the TCA could form the basis for a Section 1983 action.

In *AT&T Wireless PCS, Inc. v. City of Atlanta*, No. 99-12261; 20 Pike & Fischer Communications Regulation 442, vacated on unrelated procedural grounds at 223 F.3d 1324 (11th Cir. 2000), the 11th Circuit determined that the TCA did not foreclose Section 1983 remedies. In that case, AT&T Wireless was denied a special use permit by the City of Atlanta that was not supported by substantial evidence under the TCA (Section 332(c)(7)(B)(iii)). The court decided that this section of the TCA creates a federal right. This creates a rebuttable presumption that the federal right can be enforced through Section 1983. The court relied on the explicit direction of Congress that the TCA shall have no implied effect on other laws to conclude that the Act did not intend to preclude Section 1983 remedies from a TCA plaintiff. Although this decision was subsequently vacated and dismissed due to a purely procedural matter, there is no indication that the 11th Circuit would change its substantive analysis of the Section 1983 action in that case.

Thus, courts have found that violation of the TCA, generally, and specifically Section 332(c)(7)(B)(iii), can form the basis for a Section 1983 action.

4. PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

42 U.S.C. § 1988(b) provides that in any action to enforce a provision of 42 U.S.C. § 1983, the court, in its discretion, may award the prevailing party therein a reasonable attorney's fee as part of the recoverable costs. A plaintiff is deemed to be the prevailing party when he obtains relief on the merits of the claim which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112, 113 S.Ct. 566, 573, 121 L.Ed.2d 494, 503 (1992); *Foreman v. Dallas County, Texas*, 193 F.3d 314, 323 (5th Cir. 1999). Specifically, a plaintiff is deemed the prevailing party where "the goal of the lawsuit, a permanent injunction . . . was achieved", and where the defendants' behavior was altered thereby; *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557 (5th Cir. 1998); *Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993).

While the statue provides that an award for attorney's fees is discretionary, a prevailing plaintiff should be awarded fees under § 1988(b) absent special circumstances that would make the award unjust; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402, 88 S.Ct. 965, 966, 19 L.Ed.2d 1263, 1266 (1968); cf *Scham v. District Courts Trying Criminal Cases, supra* (although plaintiff was the prevailing party, fees were properly denied because the requested fees were outrageously high). Plaintiff ABRAMS must be deemed the prevailing party in this action, as he has demonstrated in this action that his rights under the federal TCA has been violated, and has obtained relief (i.e., an injunction directing the issuance of the CUP) which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Accordingly, upon entry of the judgment in plaintiff's favor awarding money damages under 42 U.S.C. § 1983, plaintiff will apply for an award for attorney's fees under 42 U.S.C. § 1988(b) in accordance with F.R.C.P. Rule 54(d)(2) and Local Rule 54-12.

5. PLAINTIFF IS ENTITLED TO AN IMMEDIATE JUDGMENT WITH RESPECT TO THE INJUNCTIVE RELIEF, AND THEN TO PROCEED WITH HIS ACTION FOR DAMAGES UNDER 42 U.S.C. § 1983.

To support his claim for damages under 42 U.S.C. § 1983, plaintiff will offer proof that, as a result of the defendants' refusal to issue him his CUP and his resultant inability to use his existing antenna facilities to provide Commercial Mobile Radio Service to several potential clients, he has suffered damages in the form of lost profits in excess of $250,000. In addition, plaintiff believes that discovery will uncover facts demonstrating that the defendants acted maliciously, or with a reckless or conscious disregard of plaintiff's rights under federal law, so as to justify the imposition of punitive damages. Plaintiff assumes that the court will require some sort of trial or hearing, whether by way of live testimony or by declarations, to determine the amount of damages which plaintiff is entitled to recover. Plaintiff further assumes that defendants will also require sufficient time in which to investigate plaintiff's damage claims, and to conduct their own discovery; perhaps the court may also require the parties to explore settlement per Local Rule 16-14. It may therefore be several months before the issue of damages can be tried and finally resolved. Accordingly, plaintiff submits that, pursuant to the clear intent of the TCA to expeditiously initiate competitive Personal Wireless Communications services, he is entitled to have judgment for injunctive or mandamus relief entered immediately so that he can commence service and limit further damages, and then be allowed to proceed thereafter to prove his damages under his Section 1983 claim.

The court clearly has authority to do so. F.R.C.P. Rule 54(b) provides, in part:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination and direction that there is no just reason for delay and upon an express direction for entry of judgment."

"Judgment" includes any decree or order from which an appeal lies (Rule 54(a)). An order or judgment granting (or denying) injunctive relief is final and appealable; 28 U.S.C. § 1292(a)(1). The primary purpose of this Rule is to restrict piecemeal appeals (see, e.g., *Business Communications, Inc. v. Cahners Pub. Co.*, 420 F.2d 535 (6th Cir. 1969)). However, its use is not confined solely to permitting occasional piecemeal appeals, as the court can also consider factors such as delay, economic effect, expenses, and the like; *Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 949 (7th Cir. 1980). Furthermore, the decision to direct the entry of final judgment on one of several pending claims is committed to the sound discretion of the trial court, which decision will not be disturbed on appeal absent an abuse of discretion; *Harriscom Svenska AB v. Harris Corp.* 947 F.2d 627, 629 (2nd Cir. 1991); *Atterberry V. Carpenter*, 310 F.2d 126 (9th Cir. 1962).

Significantly, since an order granting or denying injunctive relief is itself an appealable order, the court is empowered to finally and fully adjudicate the injunctive claims on an interlocutory basis and then proceed with the remaining claims, without regard to Rule 54(b). In the case of *Ackerman-Chillingsworth v. Pacific Electrical Contractors Ass'n*, 579 F.2d 484, 489 (9th Cir. 1978) the court noted:

> "Whenever a court fully adjudicates a claim for an injunction and does not execute a Rule 54(b) certificate, the adjudication is interlocutory if other claims remain pending. [Citations.]"

Accord, *Simmons v. Block*, 782 F.2d 1545, 1549 (11th Cir. 1986) (citing the *Ackerman-Chillingsworth* case, *supra.*); *Rains v. Cascade Industries, Inc.*, 402 F.2d 241, 243 (3rd Cir. 1968) ("Although the district court did not dispose of defendant's counterclaim for damages and injunctive relief and made no certification of appealability under Rule 54(b) of the Federal Rules of Civil Procedure, its judgment [] denied

plaintiff the injunctive relief which he sought and is therefore appealable under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction.") Accordingly, even if the court were to be unable to make "an express determination that there is no just reason for delay" the court may nevertheless grant plaintiff his injunctive relief on an interlocutory basis, pending resolution of his remaining claims.

The court is asked to take judicial notice of its own file of this matter, which will disclose the following chronology: Plaintiff filed its complaint for relief herein on August 24, 2000. At the Case Management Conference for this matter which took place on November 6, 2000, defendants raised their contention that this court should abstain from hearing this matter, or that this matter should be stayed, due to a prior related action which was pending in the Los Angeles County Superior Court. The result was that the court ordered this matter stayed until the Superior Court action was resolved. The Superior Court finally issued its judgment in that case on April 19, 2001. Plaintiff thereafter promptly brought a motion to vacate the stay and restore this matter to active status, which motion was opposed by defendants. Defendants have therefore done everything possible to stall and delay final resolution of this matter. Accordingly, despite the fact that plaintiff was entitled to have this matter decided in an expedited manner, this case has been pending now for over 18 months. Given the fact that plaintiff was entitled as a matter of law to have his TCA claim decided on an expedited basis but has already endured an extraordinary delay, he (and the public which deserves competitive personal wireless service) should not have to wait the additional time until plaintiff's separate claim for money damages is also finally resolved, which could take many more months, before he obtains his expedited relief.

6. CONCLUSION.

In light of the court's *Order Granting Petition*, plaintiff submits the following:

A. Judgment should be entered forthwith in favor of plaintiff, and against defendants, in the form of mandamus and/or injunction compelling defendants to forthwith grant plaintiff's application for CUP 207 and to issue said CUP 207, together with an express determination by the court that there is no just reason for delay and an express direction for immediate entry of said judgment pursuant to Rule 54(b).

B. This matter should thereupon be allowed to proceed with respect to plaintiff's claim for actual and punitive damages, as well as attorney's fees, under 42 U.S.C. §§ 1983 and 1988, respectively. The court should set this matter on a schedule to include reasonable deadlines for discovery completion, final status conference, and trial.

DATED: January 23, 2002

CHEONG, DENOVE, ROWELL,
ANTABLIN & BENNETT

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No. 03-1601

In the Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL.,
PETITIONERS

v.

MARK J. ABRAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Section 332(c)(7)(B)(v) of the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(v), authorizes "[a]ny person adversely affected" by a state or local decision regarding the placement and construction of wireless service facilities to bring an action challenging the decision in federal court on the ground that it does not comply with the federal standards set forth in Section 332(c)(7)(B) of the Act. The question presented is:

Whether a plaintiff may also bring an action in federal court under 42 U.S.C. 1983 challenging such a state or local decision on the same ground.

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a plaintiff may pursue an action for damages and attorney's fees under 42 U.S.C. 1983 and 1988 to challenge the conformity of a local governmental decision to a federal statute, where the plaintiff can enforce the same federal rights under an express right of action created by the federal statute at issue. The United States is involved in a wide array of federal-state cooperative programs and regulatory regimes in which authority, program implementation, and fiscal responsibility are allocated in various ways among federal, state, and local governmental entities. As a consequence, the United

States has a substantial interest in the standards by which courts decide whether the statutory provisions establishing such programs and regulatory regimes are enforceable under 42 U.S.C. 1983. The United States has participated as amicus curiae in a number of this Court's cases presenting such questions in recent years. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002); *Blessing* v. *Freestone*, 520 U.S. 329 (1997); *Suter* v. *Artist M.*, 503 U.S. 347 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990).

STATEMENT

1. Legal Framework

Providers of personal wireless services (such as cellular telephone service) require a network of facilities in order to supply their services to the public. For example, wireless service providers often erect antennas on top of communications towers.

Although local zoning boards do not regulate wireless communications directly, their antenna siting decisions historically have threatened to impede the development of wireless communications. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 95 (1995). When Congress considered telecommunications reform, it found that zoning had impaired the development of the wireless telecommunications industry. Congress concluded that "[s]tate and local requirements, siting[,] and zoning decisions" had "created an inconsistent, and, at times, conflicting patchwork of requirements" that were "inhibit[ing] the deployment" of wireless communications services. *Id.* at 94.

Congress enacted the Telecommunications Act of 1996 (TCA) to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers

and encourage the rapid deployment of new telecommunications technologies." TCA, Pub. L. No. 104-104, Preamble, 110 Stat. 56. While recognizing that the States retain primary authority for land use regulation, the TCA amended Section 332(c) of the Communications Act to impose specific restrictions on state and local regulation of personal wireless service facilities. See 47 U.S.C. 332(c)(7); see also *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687, 691 (3d Cir. 2002).

Section 332(c)(7) provides that, "[e]xcept as provided" in its own subparagraphs, "nothing in [the Communications Act] shall limit or affect the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of personal wireless facilities." 47 U.S.C. 332(c)(7)(A). In a subparagraph entitled "Limitations," the Act then details the restrictions on the exercise of such state or local authority. The substantive constraints imposed by that provision are that state and local regulation may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i). In the only provision expressly granting the Federal Communications Commission (FCC) a role, the Act also precludes state or local regulation of "personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(iv).[1] Section 322(c)(7)(B) also

[1] The FCC has broad jurisdiction to implement all of the provisions of the Communications Act in the public interest. See 47 U.S.C. 151, 154(i), 201(b), 303(r). That jurisdiction may include

imposes procedural restrictions on state and local decisionmaking, specifying that decisions denying a placement or construction permit must be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), and that zoning authorities must act on a request for a permit within a reasonable period of time, 47 U.S.C. 332(c)(7)(B)(ii).

Finally, the Act contains an explicit provision authorizing an action in court to enforce its limitations:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. 332(c)(7)(B)(v).

2. Factual And Procedural Background

a. Respondent, Mark J. Abrams, is an FCC-licensed amateur radio operator who also provided personal wireless services from his home. Pet. App. 2a. In 1990, petitioner, the City of Rancho Palos Verdes, California, granted respondent a permit to construct a 40-foot antenna on his property for amateur use. *Id.* at 2a, 22a. In April 1990, a permit was issued, perhaps mistakenly,

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authority to interpret the various provisions of Section 332(c)(7), such as the prohibitions against state or local government actions that "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. 332(c)(7)(B)(i); see also 47 U.S.C. 332(c)(7)(B)(iv). The Commission, however, has not promulgated regulations addressing any of the provisions of Section 332(c)(7) at issue in this case.

allowing respondent to extend his antenna to its current height of 52.5 feet. *Id.* at 22a. Notwithstanding that his permit allowed only amateur use, respondent used the antenna for both commercial and amateur use. *Id.* at 2a. In 1999, after the City learned of respondent's unauthorized commercial use, it obtained an injunction preventing him from using his antenna for commercial purposes until he obtained a conditional use permit. *Ibid.*

Respondent applied for the conditional use permit, but the City's Planning Department adopted a resolution denying the permit application. Pet. App. 23a; see *id.* at 54a-63a. Respondent appealed the decision to the City Council, which adopted a resolution upholding the Planning Commission's decision. *Id.* at 34a-53a. The City Council's resolution stated as its reasons that respondent's antenna had been used for commercial and not solely amateur purposes as authorized by his permit, *id.* at 39a-40a; the antenna exceeded 40 feet in height, *id.* at 39a; the antenna would "perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood," *id.* at 41a; and approving the permit would set a precedent for similar projects with adverse visual impacts, *ibid.*

The City Council also addressed the relevant provisions of the Communications Act. The Council stated that there was no discrimination among service providers because the permit denial rested on the adverse visual and aesthetic impacts of the antenna and respondent's refusal to mitigate those effects. Pet. App. 47a-48a. The Council also concluded that the denial did not prohibit the provision of wireless services because there was an alternative site in the city where respon-

dent could increase his transmission coverage, *id.* at 48a-49a, and he could achieve better coverage through the use of multiple, smaller antennas, *ibid.*

b. Respondent brought suit in the United States District Court for the Central District of California and invoked both the cause of action specifically provided by Section 332(c)(7)(B)(v) of the Communications Act and 42 U.S.C. 1983. Respondent filed his action within the strict time deadline provided by Section 332(c)(7)(B)(v). He claimed that the City Council's determination violated Section 332(c)(7) of the Communications Act in three ways: (1) it unreasonably discriminated against providers of functionally equivalent personal wireless services (47 U.S.C. 332 (c)(7)(B)(i)(I)), (2) it had the effect of prohibiting the provision of personal wireless services (47 U.S.C. 332(c)(7)(B)(i)(II)), and (3) it was not supported by substantial evidence contained in the written record (47 U.S.C. 332(c)(7)(B)(iii)). Pet. App. 17a. Respondent sought both an injunction requiring the City to issue a permit allowing commercial use of the tower, and damages and attorney's fees under 42 U.S.C. 1983 and 1988. Pet. App. 17a-18a.

The district court found that the City's decision was not supported by substantial evidence contained in the written record. Pet. App. 25a-26a. The court rejected, however, respondent's claim that the decision had the effect of prohibiting the provision of personal wireless services, *id.* at 32a, and, in light of its disposition, found it unnecessary to determine whether the decision unreasonably discriminated against providers of functionally equivalent personal wireless services, *id.* at 30a. As relief, the district court entered an order vacating the City Council's denial of respondent's permit, remanded the matter to the City Council, and ordered

the City Council to grant the permit subject to reasonable conditions. *Id.* at 13a-15a. The district court denied the request for damages and attorney's fees under 42 U.S.C. 1983 and 1988, concluding that those remedies were unavailable. Pet. App. 14a-15a.

c. Respondent sought appellate review of the district court's determination that remedies under Section 1983 and 1988 were not available for the City's violation of the "substantial evidence" requirement of Section 332(c)(7)(B)(iii). Pet. App. 3a. The Ninth Circuit reversed and remanded, *id.* at 12a, disagreeing with the Third and Seventh Circuits. See *PrimeCo Pers. Communications, Ltd. Partnership* v. *City of Mequon*, 352 F.3d 1147, 1152-1153 (7th Cir. 2003); *Nextel Partners*, *supra.*

The court of appeals noted at the outset that, in order to establish the availability of Section 1983 to remedy violation of a federal statute, the plaintiff bears the burden of establishing that Congress, in enacting the relevant statute, intended to create a federal right. Pet. App. 3a-4a; see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002); *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). The court observed, however, that "[t]he parties do not dispute the fact that the TCA clearly grants enforceable 'rights.'" Pet. App. 4a. The court therefore concluded that "the only question in this case is whether the City can rebut the presumption that Congress intended § 1983 remedies to be available for TCA violations." *Ibid.*

The court of appeals recognized this Court's conclusion that "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983," *Gonzaga Univ.*, 536 U.S. at 284, but that the presumption could be overcome by showing, *inter alia*, that Congress "creat[ed] a

comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 285 n.4 (quoting *Blessing*, 520 U.S. at 341). See Pet. App. 3a-5a. Here, the court of appeals was of the view that Section 332(c)(7) did not establish such a scheme.

Recognizing that Section 332(c)(7) established a "private right of action" for "expedited judicial review" subject to "a short statute of limitations (30 days)," the court of appeals found that the Section 332(c)(7) remedial scheme was insufficient to "close the door on § 1983 liability," because it did "not provide for any type of relief." Pet. App. 5a-7a. The court of appeals rejected the argument that Section 332(c)(7) was "remedial," concluding instead that "[s]hortening the limitations period to thirty days imposes a burden on an aggrieved plaintiff, not a benefit." *Id.* at 8a. Acknowledging that Section 332(c)(7) does provide expedited judicial review, the court stated that "an expedited decision does nothing to remedy a TCA violation in itself. Significantly, a court can fully comply with all of the TCA's provisions before it determines liability. Thus, the TCA contains *procedural*, rather than *remedial*, provisions." *Id.* at 8a-9a.

The court also rejected the argument that Congress's intent to preclude recourse to Section 1983 could be gleaned from the incompatibility of Section 332(c)(7)'s 30-day limitations period and requirement of expedited review with Section 1983's longer limitations period and lack of an expedited review requirement. In the court's view, "Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time," and the Section 332(c)(7) restrictions are accordingly "compatible with § 1983's remedial provisions." Pet. App. 9a.

Finally, the court of appeals also relied on the TCA's general savings clause, Pub. L. No. 104-104, Tit. VI, § 601(b)(1), 110 Stat. 143 (47 U.S.C. 152 note), as preserving a Section 1983 action. Pet. App. 10a-12a. The court distinguished the rejection of a similar savings clause argument in *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 n.31 (1981), by noting that the "TCA's general savings clause forbids the impairment of any federal 'law'—not the impairment of any 'right.' Thus, the TCA's general savings clause sweeps more broadly than those the Supreme Court evaluated in *Sea Clammers* and includes § 1983 within its ambit." Pet. App. 12a.

SUMMARY OF ARGUMENT

Determining whether an alleged violation of a federal statute gives rise to a Section 1983 action generally involves a two-part inquiry. The court must first ask whether the plaintiff has shown that the statutory provision in question gives rise to a federal right. Where the existence of a federal right is established, Section 1983 is unvailable upon a showing that Congress either expressly shut the door to private enforcement or impliedly created a comprehensive remedial scheme that is incompatible with enforcement under Section 1983. Especially in the context of a statute that creates an express, but limited, cause of action, the ultimate inquiry must focus on whether Congress intended that express cause of action to be exclusive. That is clearly the case with respect to Section 332(c)(7)(B)(v) of the Communications Act.

Section 332(c)(7)'s scheme is comprehensive in that it permits aggrieved persons to bring suit and obtain meaningful judicial relief for violations of the statutory requirements at issue in a way that is specifically targeted to the relevant context. A statutory scheme need not be complex in order to be sufficiently comprehensive to reflect an intent to foreclose resort to Section 1983. If a statute expressly creates a cause of action that provides for meaningful relief, it is "comprehensive" in the relevant sense.

Section 332(c)(7) is remedial in that it provides, at the very least, for expedited judicial review and the availability of injunctive relief. The court of appeals mistakenly believed that the scheme provided for no relief at all, but settled law establishes that the absence of an express enumeration of permissible forms of relief in Section 332(c)(7)(B)(v) has the effect of conferring on courts the authority to grant appropriate relief, which surely includes at least injunctive relief. And a remedial scheme need not be as generous as Section 1983 in order to displace it. Indeed, efforts to tailor a remedial scheme to the specific context by limiting the time of filing or the types of remedies available evinces an intent to provide a set of remedies distinct from Section 1983.

The scheme established by Section 332(c)(7) is incompatible with enforcement under Section 1983. Section 1983 provides for damages and attorney's fees (via Section 1988), whereas Congress precluded the award of such attorney's fees, in accordance with the traditional American Rule, by failing to provide for them in Section 332(c)(7)(B)(v). Moreover, while Section 1983 actions are governed by their own limitations rules, Section 332(c)(7)(B)(v) prominently features an abbreviated 30-day statute of limitations period, paired with

a requirement of expedited review. Although the court of appeals suggested that the 30-day limitations period under Section 332(c)(7)(B)(v) might be applicable in a Section 1983 suit brought to enforce Section 332(c)(7), there is no legal basis for allowing a claim-specific statute of limitations to trump Section 1983's limitations period. The more straightforward way to reconcile the two statutes is to read Section 332 (c)(7)(B)'s express cause of action, not just its limitations period, as exclusive.

Finally, the Telecommunications Act's general savings clause does not suggest a different result. In *Sea Clammers*, this Court rejected a similar savings clause argument, and the modest differences in wording between the savings clauses in *Sea Clammers* and the savings clause here do not warrant a different result. In any event, precluding a Section 1983 remedy here would not "modify, impair, or supersede" Section 1983 under the terms of the TCA's savings clause. TCA § 601(b)(1), 110 Stat. 143 (47 U.S.C. 152 note). To the contrary, it would leave Section 1983 actions available in precisely the same circumstances as before Section 332(c)(7)(B)(v) was enacted.

ARGUMENT

I. SECTION 332(c)(7) PROVIDES AN EXPLICIT REMEDIAL SCHEME THAT IS INCOMPATIBLE WITH A RIGHT OF ACTION UNDER 42 U.S.C. 1983

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. See App., *infra*, 2a-3a. This Court held in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that Section 1983

"means what it says" and authorizes suits by private individuals against state actors to enforce rights created by federal statutes as well as those created by the Constitution. *Id.* at 4. This Court has reaffirmed that holding on numerous occasions. See, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 279; *Blessing*, 520 U.S. at 340; *Suter* v. *Artist M.*, 503 U.S. 347, 355 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990); *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987).

Not all federal statutes create rights, however, and this Court has established a two-step method of analysis for determining the availability of a Section 1983 action for the violation of a federal statute. *E.g.*, *Gonzaga Univ.*, 536 U.S. at 284-285 & n.4; *Blessing*, 520 U.S. at 340-341; *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989).

First, the plaintiff has the burden of establishing that Congress, in enacting the statute, "*intended to create a federal right.*" *Gonzaga Univ.*, 536 U.S. at 283. *Gonzaga University* makes clear that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." *Id.* at 290. Ordinarily, the statute at issue must contain "'rights-creating' language," *id.* at 287 (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001), and *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979)), and must confer an "*individual* entitlement" rather than reflecting an "aggregate" focus, *Gonzaga*, 536 U.S. at 287-288 (quoting *Blessing*, 520 U.S. at 343). Earlier cases suggested as well that the plaintiff must establish that "Congress must have intended that the provision in question benefit the plaintiff," "that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial

competence," and that "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id.* at 282 (quoting *Blessing*, 520 U.S. at 340-341).

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga Univ.*, 536 U.S. at 284. That presumption may be overcome by establishing that Congress "specifically foreclosed a remedy under § 1983." *Smith* v. *Robinscn*, 468 U.S. 992, 1005 n.9 (1984). Such a showing may be made by demonstrating "that Congress shut the door to private enforcement either expressly, through 'specific evidence from the statute itself,' *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987), or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983,' *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997)." *Gonzaga Univ.*, 536 U.S. at 284-285 n.4; see *Wilder*, 496 U.S. at 521 (Section 1983 action impliedly "foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983'") (quoting *Sea Clammers*, 453 U.S. at 20).

Thus, a statutory scheme that is "comprehensive," "remedial," and "incompatible with individual enforcement under § 1983" will be found to have impliedly displaced an action under Section 1983. *E.g.*, *Gonzaga Univ.*, 536 U.S. at 285 n.4; *Blessing*, 520 U.S. at 341; *Sea Clammers*, 453 U.S. at 20. Moreover, when Congress creates an express cause of action that is limited in important ways that reflect the specific statutory context, the ultimate question remains whether Congress intended the express statutory cause of action to

supplant the Section 1983 remedy. Properly understood against the backdrop of this Court's Section 1983 jurisprudence and Congress's decision to provide an express, but limited, cause of action, Section 332(c)(7) of the Communications Act impliedly forecloses a Sectoin 1983 cause of action.

A. Section 332(c)(7) Is A "Comprehensive" Scheme Within The Meaning Of This Court's Precedent Because It Allows Private Parties To Obtain Judicial Review Of Alleged Violations Of The Statutory Requirements

1. In two cases, this Court has found a federal statutory scheme to be sufficiently comprehensive so as to displace Section 1983. The first of those cases, *Sea Clammers*, involved the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, which this Court described as having "unusually elaborate enforcement provisions." 453 U.S. at 13. The statutes at issue in *Sea Clammers* provided for administrative enforcement by the Administrator of the Environmental Protection Agency or a State that administers its own permit program; judicial review at the behest of "any interested person" of a number of EPA actions, including the issuance of permits; and citizen suits by private persons for injunctions against pollution by violators. *Id.* at 13-14, 17. This Court concluded that "the existence of these express remedies demonstrates * * * that Congress intended to * * * supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

The second case, *Smith* v. *Robinson*, 468 U.S. 992 (1984), involved proceedings to secure a free and appropriate public education under the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.* (1982). The Act

provided, *inter alia*, for notice to a handicapped child's parent any time a state agency proposed or refused to initiate a change in status, 20 U.S.C. 1415(b)(1)(C) (1982), an opportunity for the parents to inspect their child's records, 20 U.S.C. 1415(b)(1)(A) (1982), and the right to an "impartial due process hearing" with enumerated rights, 20 U.S.C. 1415(b)(2) and (d) (1982). Additionally, the Act allowed a child's parent or guardian to appeal the decision by the hearing officer to the state education agency, and ultimately to a federal district court if unsatisfied with the results. 20 U.S.C. 1415(c) and (e) (1982). Noting the Act's "elaborate procedural mechanism to protect the rights of handicapped children," 468 U.S. at 1010-1011, this Court found that the availability of a Section 1983 action "would * * * render superfluous most of the detailed procedural protections outlined in the statute," *id.* at 1011, which "would be inconsistent with Congress' carefully tailored scheme," *id.* at 1012.

2. While the relevant provisions of the Communications Act are less complex than the enforcement schemes in *Sea Clammers* and *Robinson*, they are nonetheless "sufficiently comprehensive" to preclude a statute-specific Section 1983 action. When Congress expressly creates a cause of action and limits that cause of action in ways that are sensitive to the particular statutory context, there is every reason to think that Congress means the new cause of action to supplant the Section 1983 remedy and to provide a "comprehensive" and complete remedial scheme. *Sea Clammers*, 453 U.S. at 20.

Section 332(c)(7)(B)(v) provides in relevant part:

> Any person adversely affected by any final action or failure to act by a State or local government or

> any instrumentality thereof that is inconsistent with [these provisions] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

See App., *infra*, 2a. Section 332(c)(7)(B)(v) undoubtedly creates a cause of action—*i.e.*, a right in a particular class of persons ("[a]ny person adversely affected") "to judicially enforce the statutory rights or obligations." *Davis* v. *Passman*, 442 U.S. 228, 239 (1979). That cause of action has two important express incidents that reflect the unique context in which such actions arise: a 30-day limitations period for commencing an action, and a requirement for expeditious resolution of the plaintiff's claim by the court. In addition, Section 332(c)(7)(B)(v) necessarily provides for injunctive relief as a remedy. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 69 (1992) ("if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order * * * appropriate relief"); see also *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940) (equitable relief is appropriate, despite lack of express statutory reference to such relief).[2]

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[2] Courts have awarded injunctive relief in actions under Section 332(c)(7)(B)(v). See *PrimeCo Pers.*, 352 F.3d at 1152-1153; *Nextel Partners*, 286 F.3d at 695 n.6; *New Par* v. *City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *National Tower, LLC* v. *Planville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002); *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999). The Section 332(c)(7)(B)(v) right of action closely resembles a suit for judicial review of an administrative action, complete with its requirement of "final action" and the "substantial evidence" standard of Section 332(c)(7)(B)(iii). This

Congress's creation of a judicial cause of action such as Section 332(c)(7)(B)(v) to enforce a federal right, with its express and necessarily implied incidents under federal law, is "sufficiently comprehensive" to indicate a congressional intent to preclude a Section 1983 action to enforce the same right. Although such a cause of action may not be complex, it is "comprehensive" in the relevant sense because it provides all that is necessary to enable persons benefitted by the statute to obtain judicial relief for violations of the federal protections at issue. See *Nextel Partners*, 286 F.3d at 694 (comprehensiveness turns here on "the availability of private judicial remedies under the statute giving rise to the claim"). The availability of private judicial remedies was the element that the statutes in *Sea Clammers* and *Robinson* had in common, and it is a sufficient condition for a Congressional enactment to be deemed "comprehensive" for purposes of supplanting an action under Section 1983.[3]

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case, however, does not present the question whether and under what circumstances other forms of relief are available as well. Cf. *PrimeCo Pers.*, 352 F.3d at 1153 (damages presumptively available under Section 332(c)(7)(B)(v)); *Omnipoint Communications, Inc.* v. *City of White Plains*, 175 F. Supp. 2d 697, 707-708 (S.D.N.Y. 2001) (noting that no court has awarded damages under Section 322(c)(7)(B)(v), but concluding that damages are available in a Section 1983 action to enforce Section 332(c)(7)).

[3] Although express statutory causes of action that (as in this case) allow private parties to bring suit and obtain meaningful judicial review will almost always be sufficient to be considered "comprehensive" within the meaning of this Court's Section 1983 decisions, such provisions authorizing judicial review will not always be necessary in order to supplant the Section 1983 remedy. Depending on the particular context, remedial schemes that do not afford meaningful judicial review may nevertheless be sufficiently "comprehensive" to satisfy this Court's analysis, *e.g.*, by providing

3. That conclusion is supported by three cases in which the Court found a Section 1983 remedy available: *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997).

In *Wright*, low-income housing tenants sought to sue a public housing authority for the imposition of a utility consumption surcharge that they claimed deprived them of their statutory right to pay only the prescribed maximum portion of their income as rent. 479 U.S. at 420-422. The statutory program as interpreted by the Fourth Circuit was more complicated than the one in this case, providing that "[u]nder the statute the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract." *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 771 F.2d 833, 836 (4th Cir. 1985) (quoting *Phelps* v. *Housing Auth.*, 742 F.2d 816, 821 (4th Cir. 1984)). This Court found, however, that, although the scheme was complex, it was not sufficiently "comprehensive" because of its lack of a judicial review provision: "In both *Sea Clammers* and *Smith* v. *Robinson*, the statutes at issue themselves provided for *private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy*. There is nothing of that kind found in the * * * Housing Act." 479 U.S. at 427 (emphasis added).

In *Wilder*, an association of public and private hospitals sought to bring suit under Section 1983 challenging

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appropriate administrative avenues for relief. See, *e.g.*, U.S. Br. at 24-30, *Gonzaga Univ.* v. *Doe*, *supra* (No. 01-679).

the method by which States reimbursed health care providers under a provision of the Medicaid Act, 42 U.S.C. 1396, that required reimbursement according to rates that a "State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," 42 U.S.C. 1396a(a)(13)(A) (Supp. V 1988). *Wilder*, 496 U.S. at 501-502. In finding that the Act did not create a comprehensive remedial scheme sufficient to displace Section 1983, this Court again contrasted the scheme at issue with the ones set out in *Sea Clammers* and *Smith* v. *Robinson*, emphasizing that "[t]he Medicaid Act contains no comparable provision for *private judicial* or administrative enforcement." *Id.* at 521 (emphasis added).

Similarly, in *Blessing*, where mothers whose children were eligible for state child support services under Title IV-D of the Social Security Act filed a Section 1983 suit against the Director of the Arizona Department of Economic Security, this Court again found that the lack of a private remedy made the remedial scheme insufficiently comprehensive to bar relief under Section 1983:

> The enforcement scheme that Congress created in Title IV-D is far more limited than those in *Sea Clammers* and *Smith*. Unlike the federal programs at issue in those cases, Title IV-D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress. The only way that Title IV-D assures that States live up to their child support plans is through the Secretary's oversight.

520 U.S. at 348 (citation omitted). Cf. *Livadas* v. *Bradshaw*, 512 U.S. 107, 133-134 (1994) (Congress did not mean "to foreclose relief under § 1983" where statute contains "complete absence of provision for relief from governmental interference"). Here, Section 332(c)(7)(B)(v) *does* provide a private judicial remedy to ensure that States and local governments live up to their obligations. Accordingly, it is sufficiently comprehensive to preclude a Section 1983 action based on violation by a state or local government of the obligations imposed by Section 332(c)(7).

B. The Court Of Appeals' Conclusion That Section 332 (c)(7)(B)(v) Is Not "Remedial" Is Mistaken

1. The main thrust of the court of appeals' reasoning was that Section 332(c)(7) is insufficiently "remedial" because it "does not provide for any type of relief." Pet. App. 7a. That reading of the statute is mistaken.

Initially, the court of appeals erred in concluding (Pet. App. 7a) that Section 332(c)(7)(B)(v) "contains no remedies at all." In common with many other federal causes of action (including Section 1983 itself), Section 332(c)(7)(B)(v) does not specify the relief permitted. It is settled law, however, that Congress's failure to specify particular remedies in providing for a cause of action does not, at a minimum, preclude the availability of injunctive relief. See pp. 16-17, *supra*. Indeed, if no remedy were available to redress a violation of Section 332(c)(7), federal courts would lack Article III jurisdiction to hear an action under that provision, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103, 105-106 (1998), and Congress's attempt to create a cause of action would simply be a nullity. The court of appeals' belief that Section 332(c)(7)(B)(v) "contains no remedies at all" is mistaken.

2. The court of appeals also appeared to rest its holding on the court's perception that Section 332(c)(7)(B)(v) is not "remedial" because the statutory 30-day limitations period "imposes a burden on an aggrieved plaintiff, not a benefit," and "[t]he only benefit to an aggrieved plaintiff is expedited judicial review." Pet. App. 8a. The appropriate inquiry in a case like this is whether Congress expressly or impliedly intended to supplant a Section 1983 remedy, not whether Congress intended to grant a "benefit" to plaintiffs. But even if the inquiry were focused on whether Section 332(c)(7)(B)(v) grants a "benefit," the court of appeals would be mistaken. Section 332(c)(7)(B)(v) creates a most notable "benefit"—an express cause of action for an aggrieved person to obtain judicial relief from a flawed state or local decision concerning the siting or construction of personal wireless service facilities.

Insofar as the court of appeals reasoned that a Section 1983 cause of action should be available because Section 332(c)(7)(B) confers no "benefit" on a plaintiff *in comparison with* Section 1983, that inquiry would be fundamentally mistaken. Having determined that the plaintiff possesses a federal right—an issue that was not litigated by the parties in this case, see Pet. App. 4a—a court applying the *Gonzaga* inquiry must next determine whether Congress "shut the door to private enforcement either expressly * * * or impliedly." 536 U.S. at 284 n.4 (internal quotation marks omitted). Where Congress has expressly created an alternative judicial remedy that contains restrictions not found in Section 1983, that provides a strong indication that Congress intended those restrictions—and not the more generous standards applicable to a Section 1983 action—to apply. See *Sea Clammers*, 453 U.S. at 20

("[W]hen a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.") (internal quotation marks omitted). Thus, the fact that an express cause of action in this sense confers no "benefit" on a plaintiff relative to Section 1983 strongly supports the conclusion that Congress intended to preclude a plaintiff from bringing a Section 1983 action in its place. Indeed, the court of appeals' reasoning to the contrary would lead to the conclusion that the only cause of action sufficient to displace Section 1983 would be one that (at a minimum) reproduced Section 1983. Cf., *e.g.*, *Playboy Enters., Inc.* v. *Public Serv. Comm'n*, 906 F.2d 25, 33 (1st Cir.) ("For certain, a statute's express remedies need not be as comprehensive or efficient as § 1983 in order to evince an intent to preclude use of § 1983."), cert. denied, 498 U.S. 959 (1990).

C. A Right Of Action Under Section 1983 Would Be Incompatible With Section 332(c)(7)

This Court has indicated that Congress's intention to displace Section 1983 may also be evidenced by incompatibilities between Section 1983 and the particular statute for which Section 1983 is said to provide a remedy. See *Gonzaga Univ.*, 536 U.S. at 284 n.4; *Blessing*, 520 U.S. at 342. Here, at least two such incompatibilities are present.

First, application of Section 1983 would allow the award of attorney's fees to a party who prevailed on a claim that the underlying strictures of Section 332(c) had been violated. See 42 U.S.C. 1988. As this Court has explained, however, "it is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994); see *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247-262 (1975). Congress, which is surely aware of that rule, did not provide for awards of attorney's fees in Section 332(c)(7)(B)(v), and a prevailing plaintiff in a suit brought directly under that provision would thus have no entitlement to a fee award. For that reason, permitting a Section 1983 action would be incompatible with Section 332(c)(7). See *PrimeCo Pers.*, 352 F.3d at 1152; *Nextel Partners*, 286 F.3d at 695.

Second, Section 332(c)(7)(B)(v) provides that a suit must be commenced within 30 days of the action or failure complained of, and requires the court hearing the suit to adjudicate it "on an expedited basis." The evident purpose of those requirements is to speedily resolve siting disputes and effectuate "the rapid deployment of new telecommunications technologies" in furtherance of the public interest. TCA Preamble, 110 Stat. 56. By contrast, Section 1983 is subject to its own limitations rules—either the four-year period provided for in 28 U.S.C. 1658, see *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004), or the appropriate state limitations period under *Wilson* v. *Garcia*, 471 U.S. 261, 267 (1985); see 42 U.S.C. 1988(a).[4] For that

[4] Although the Third Circuit, *Nextel*, 286 F.3d at 695, and petitioners (Pet. 24) seem to assume that Section 1983 by itself would effectively impose a four-year statute of limitations, there appears to be some uncertainty on that point. As the Court explained in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), Sections 1983 and 1988 require that an action brought under Section 1983 employ the applicable statute of limitations from the jurisdiction in which the action is filed. *Id.* at 272, 280. In California, that would apparently mean using a one-year statute of limitations. See *Azer* v. *Connell*,

reason as well, permitting an action under Section 1983 would be incompatible with Section 332(c)(7)(B)(v). Cf. *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1979) (Title VII violations could not be asserted under 42 U.S.C. 1985 because, among other reasons, "[t]he short and precise time limitations of Title VII would be grossly altered").

The court of appeals suggested that any incompatibility between the limitations periods in Sections 332(c)(7) and 1983 could be minimized by engrafting onto a Section 1983 action the short filing period and expedition requirement of Section 332(c)(7)(B)(v). See Pet. App. 7a. The court's novel attempt to hypothesize a hybrid cause of action serves only to underscore the implausibility of its ruling. No evidence exists that

306 F.3d 930, 936 (9th Cir. 2002) (citing Cal. Civ. Proc. Code § 340(3) (West Supp. 2004)).

Under 28 U.S.C. 1658(a), however, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." In *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004), this Court held that the four-year statute of limitations under Section 1658 applies if the plaintiff's claim was made possible by a post-1990 enactment. *Id.* at 1845. That case involved an action brought under portions of 42 U.S.C. 1981 that had been amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Jones*, 124 S. Ct. at 1839. Here, while Section 332(c)(7)(B) was enacted post-1990, Section 1983 was not, and none of its provisions relevant to this action has been amended since 1990. Under *Jones*, therefore, the selection of the appropriate statute of limitations to govern a Section 1983 claim seeking to enforce Section 332(c)(7)(B) would turn on whether such a cause of action is properly viewed as "arising under" Section 1983 or, instead, Section 332(c)(7)(B). There is no need to resolve that question in this case, however, because either a one-year or a four-year limitations period would be inconsistent with the 30-day time frame set forth in the Communications Act.

Congress, in enacting the 1996 legislation at issue here, sought to alter the limitations period applicable to Section 1983 actions. Indeed, the court of appeals' suggestion would appear to run afoul of the general savings clause in the Telecommunications Act, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law." 47 U.S.C. 152 note. See pp. 25-27, *infra*. Construing Section 332(c)(7)(B)(v) to alter the limitations period ordinarily applicable in Section 1983 actions would indeed "modify" the Section 1983 action, in violation of the savings clause.[5]

II. THE TELECOMMUNICATIONS ACT'S GENERAL SAVINGS CLAUSE DOES NOT SUPPORT THE AVAILABILITY OF AN ACTION UNDER SECTION 1983

The Telecommunications Act contains a general savings clause, which provides:

> No implied effect. —This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments.

[5] A Section 1983 remedy may also be inconsistent with the express cause of action created in Section 332(c)(7)(B)(v) because the latter (which confers a right to sue on persons adversely affected by a governmental entity"s "final action or failure to act") appears to contemplate exhaustion of state or local administrative remedies, whereas "the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983." *Wright*, 479 U.S. at 427-428 (citing *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 (1982)). If Section 332(c)(7)(B)(v) permits only injunctive relief, a further incompatibility with Section 1983 would exist.

TCA § 601(c)(1), 110 Stat. 143 (47 U.S.C. 152 note). The court of appeals believed that this clause demonstrated an intent not to displace Section 1983, reasoning that the "plain language" of the clause required such a result because Section 1983 is a federal law. Pet. App. 10a, 12a. As the court of appeals noted, however, this Court concluded that two similar savings clauses in *Sea Clammers* were not indicative of a congressional intent to make a Section 1983 action available. See *Sea Clammers*, 453 U.S. at 7 n.10 (citing 33 U.S.C. 1365(e)); *id.* at 7 n.11 (citing 33 U.S.C. 1415(g)(5)); *id.* at 20 n.31 (rejecting argument that savings clauses made Section 1983 action available). The court of appeals sought to distinguish *Sea Clammers* on the ground that "[t]he TCA's general savings clause forbids the impairment of any federal 'law'—not the impairment of any 'right.' Thus, the TCA's general savings clause sweeps more broadly than those the Supreme Court evaluated in *Sea Clammers* and includes § 1983 within its ambit." Pet. App. 12a.

The court of appeals' attempt to distinguish *Sea Clammers* is mistaken. First, the savings clauses in *Sea Clammers* provided that the environmental statutes in that case do not "restrict any right which any person * * * may have under any statute * * * to seek enforcement * * * or to seek any other relief." 453 U.S. at 7-8 nn.10-11 (quoting 33 U.S.C. 1365(e) and 33 U.S.C. 1415(g)(5)). This Court held that construing the environmental statutes in *Sea Clammers* to preclude a Section 1983 action did not "restrict any right * * * under any statute * * * to seek enforcement * * * or * * * relief" and was therefore permissible under the savings clauses in *Sea Clammers*. See 453 U.S. at 20 n.31. Section 1983 is surely both a "right * * * to seek enforcement * * * or relief" (under the savings clauses in *Sea Clammers*) and a "law" (under the savings clause in this case). If the preclusion of Section 1983 relief in *Sea Clammers* did not restrict any right to seek relief, then precluding Section 1983 relief here does not "modify, impair, or supersede" any federal law for purposes of the TCA general savings clause.

Second, a determination that Section 1983 is not available to enforce Section 332(c)(7) would not modify, impair, or supersede Section 1983, which would continue to operate precisely as it did before Section 332(c)(7) was enacted. The only question in this case is whether Section 1983 should be *expanded* to include a new type of action—a claim that a state or local government has violated Section 332(c)(7)—which, before the enactment of that provision, had never previously been available. A conclusion that Section 1983 should not be expanded to this new territory does not modify, impair, or supersede Section 1983, and it accordingly does not violate the TCA's general savings clause. See *Nextel Partners*, 286 U.S. at 696 ("We do not hold that enactment of the TCA had any effect on § 1983; we simply hold that the TCA itself did not create a right that can be asserted under § 1983 in lieu of the TCA's own remedial scheme.").[6]

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[6] In *Verizon Communications, Inc.* v. *Law Offices of Curtis Trinko*, 124 S. Ct. 872 (2004), the Court addressed a neighboring TCA savings clause that provides that "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." TCA § 601(b)(1), 110 Stat. 143 (47 U.S.C. 152 note). The Court held that the clause "preserves claims that satisfy existing antitrust standards," but that it "does not create new claims that go beyond existing antitrust standards." 124 S. Ct. at 878. That holding is consistent with the appropriate

CONCLUSION

The judgment of the court of appeals should be reversed.

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reading of the general savings clause in this case, which preserves preexisting Section 1983 claims without creating new ones.

APPENDIX

1. Section 332(c)(7)(A) and (B) of Title 47 of the United States Code provides:

Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facili-

ties shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

2. Section 1983 of Title 42 of the United States Code provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Section 1988(b) of Title 42 of the United States Code provides (brackets in original):

Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(6)

Supreme Court, U.S.
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No. 03-1601

In the

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, ILLINOIS, INDIANA, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, OHIO, OREGON, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§1983 and 1988. *See* Pet. at i.

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Other Authorities

C. Jacques & J. Beerman, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735 (2001) ..... passim

H.R. Conf. Rep. No. 104-458 (Jan. 31, 1996) ..... passim

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INTEREST OF AMICI CURIAE

As explained more fully in the amici States' certiorari-stage brief, the States' interests in this case are threefold. *First*, although petitioner is a California municipality, the Communications Act provision at issue here, 47 U.S.C. §332(c)(7), "repeatedly refers to 'State or local' governments, thus explicitly placing obligations on states." C. Jacques & J. Beermann, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735, 751-52 (2001). *Second*, as they have done when addressing §332(c)(7), lower courts have disagreed whether other provisions of the Act – provisions that directly target States and their officers, *see, e.g.*, 47 U.S.C. §§252, 253 – may be enforced via 42 U.S.C. §1983's generic cause of action. *Third*, and most importantly, the amici States, whose officers and employees are perhaps the most frequent defendants in suits brought under §1983, have a keen interest in preventing the unwarranted extension of §1983 into areas governed by other, more specific remedial regimes. The rule of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) – like the rule of *Preiser v. Rodriguez*, 411 U.S. 475 (1973) – serves the important function of precluding plaintiffs from invoking §1983's open-ended remedial regime where Congress has exercised its prerogative to establish a more specific, and more limited, cause of action.

SUMMARY OF ARGUMENT

Because 47 U.S.C. §332(c)(7) both (i) establishes its own "comprehensive" remedial scheme and (ii) fails to create private "rights," its dictates may not be enforced via §1983. Because the former condition is dispositive here, the Court needn't reach the latter.

1. Section 332(c)(7), which expressly provides to any person "adversely affected" by a local zoning authority's decision a private cause of action "in any court of competent

jurisdiction," entails a sufficiently comprehensive remedial scheme to preclude resort to §1983.

a. Read together, this Court's decisions – from *Sea Clammers* to *Gonzaga* – establish a clear rule: Where Congress goes to the trouble of prescribing a private cause of action to enforce a statute's directives – at least where, as here, that cause of action entails some form of individualized *judicial* review – the rules, restrictions, and remedies that attend that cause of action govern, and may not be circumvented through resort to §1983's generic terms. Statutes the Court has found insufficiently comprehensive to preempt §1983 have uniformly relied entirely on agency enforcement, and made no provision for private suits.

b. The clear rule established in *Sea Clammers* and its progeny squares with this Court's decisions in the *Preiser-Heck* line of cases. The point of those decisions has been that the specific habeas corpus statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – trumps §1983's general terms. So, too, here, a plaintiff may not simply bypass perceived limitations in §332(c)(7)'s scheme by suing under §1983.

c. The Ninth Circuit's "more is better" approach to comprehensiveness – here, that §332(c)(7) is insufficiently beneficial to plaintiffs – is unworkable. It offers no principled basis for distinguishing one statutory cause of action (with its unique package of rules and remedies) from the next. Worse, the Ninth Circuit's view – at its logical extreme, that *any* restriction on a plaintiff's ability to recover on an underlying statute's cause of action justifies a conclusion that §1983 remains available – risks extinguishing the *Sea Clammers* rule altogether.

d. Reliance on §1983 is unnecessary to the achievement of §332(c)(7)'s purposes. Time and again, wireless operators have sued to enforce §332(c)(7) – and obtained injunctive relief permitting construction – without relying on §1983. The recent rush to §1983 has been fueled by the prospect of recouping attorney's fees. In the long run, however, large fee awards will only further enrich

communications conglomerates at the expense of local governments and impede the roll-out of new technology.

2. Section 332(c)(7) does not "unambiguously" create private "rights" enforceable under §1983.

a. Section 332(c)(7)'s substantive provisions are addressed to the entities being regulated (here, local zoning boards) rather than to those seeking protection (would-be wireless operators). Accordingly, unlike Titles VI and IX, §332(c)(7) entirely lacks the sort of rights-creating language necessary to the recognition of §1983-enforceable rights.

b. Section 332(c)(7)'s provisions are also too "vague and amorphous" to create privately enforceable rights. The key terms "unreasonabl[e] discriminat[ion]," "effect[ive] prohibit[ion]," and "reasonable period" are not defined or clarified anywhere in the statute, implementing regulations, or legislative history.

c. Principles of federalism counsel against finding federally-enforceable rights in §332(c)(7). Not only is there no indication that Congress intended to *upset* the deference traditionally owed to local zoning decisions, the relevant evidence shows that Congress sought, as §332(c)(7)'s title plainly states, to "preserve" local zoning authority.

d. Section 332(c)(7)(v)'s limited judicial remedy does not indicate the existence of §1983-enforceable rights. That subsection merely gives aggrieved individuals standing (and a cause of action) to enforce §332(c)(7)'s provisions. It does not alter the fundamental nature – *i.e.*, public, not private – of the rights those provisions protect.

ARGUMENT

The general federal civil-rights statute, 42 U.S.C. §1983, provides a cause of action for persons alleging deprivations of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the question arose whether §1983's "and laws" clause should be read (i) in light of its Reconstruction-era pedigree, to authorize only those suits

alleging violations of federal statutes aimed at protecting "equal rights," or (ii) literally, to sanction suits alleging violations of any federal statute. Over Justice Powell's vigorous dissent, *see id.* at 11-34, the Court opted for the latter interpretation, *see id.* at 4-8.

The following year, however, this Court "recognized two exceptions to the application of §1983 to statutory violations": first, where Congress has either expressly or impliedly "foreclosed private enforcement of [a] statute in the enactment itself"; and second, where the statute in question is not "the kind that create[s] enforceable 'rights' under §1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)). Because the Court in *Sea Clammers* concluded that "Congress [had] foreclosed a §1983 remedy" in the statutes there at issue, it found no need to reach the "second question" whether those statutes "created 'rights, privileges, or immunities' within the meaning of §1983." *Id.*

This case presents the same questions – and requires the same answer. As an initial matter, because Congress established in 47 U.S.C. §332(c)(7) a "comprehensive" remedial scheme to address alleged violations of that statute, resort may not be had to §1983's generic cause of action. Accordingly, here, as in *Sea Clammers*, the Court need not address the question whether §332(c)(7) gives rise to private "rights" enforceable under §1983. Even if the Court were to address that question, the answer, we submit, would be a clear no.[1]

[1] We note at the outset that several of §332(c)(7)'s substantive provisions have been assailed, with some success, as an effort to "compel[] state and local governments to administer a federal regulatory program," in violation of the Tenth Amendment's anti-commandeering principles. *Petersburg Cellular P'ship v. Board of Supervisors*, 205 F.3d 688, 702 (4th Cir. 2000) (opinion of Niemeyer, J.); *see also* Jacques & Beermann, *supra* at 1, at 772-86 (§332(c)(7) violates the Tenth Amendment). *But cf. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (summarily rejecting Tenth Amendment challenge). Although no Tenth Amendment question is presented here, §332(c)(7)'s constitutional infirmities may well counsel against its private enforcement through §1983. *See, e.g., Jones v. United States*, 529 U.S. 848, 857 (2000).

I. Section 332(c)(7) Establishes A Sufficiently "Comprehensive" Remedial Scheme To Preclude Resort To §1983's Generic Cause Of Action.

In *Sea Clammers*, this Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983." 453 U.S. at 20. Accordingly, the Court emphasized, when "'a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983.'" *Id.* (citation omitted). The principal question in this case is whether the private cause of action codified at 47 U.S.C. §332(c)(7) is sufficiently "comprehensive" within the meaning of *Sea Clammers* to preclude resort to §1983.

Section 332(c)(7) prescribes an express private cause of action for expedited judicial review to redress violations of the Communications Act's wireless equipment-siting provisions:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis ....

47 U.S.C. §332(c)(7)(B)(v).

In the decision below, the Ninth Circuit held that §332(c)(7)'s remedial scheme is not sufficiently comprehensive to preempt §1983 suits. The court acknowledged that §332(c)(7) provides for a private cause of action "by allowing aggrieved plaintiffs the right to bring an

action in any court of competent jurisdiction ...." Pet. App. 6a. But, the Ninth Circuit said, "the statute grants no remedies beyond procedural rights." *Id.* It does not, for instance, "explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs." *Id.* at 5a. "Rather," the court observed, §332(c)(7) "only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress [statutory] violations" in court. *Id.* That, from the Ninth Circuit's perspective, was not enough.

In deciding as it did, the Ninth Circuit embraced what we, for ease of analysis, have called a "more is better" approach to *Sea Clammers*' comprehensiveness criterion. *See* Br. of the States of Alabama, *et al.*, at 6, 8, 9, 10, 14 (certiorari stage). The Ninth Circuit views a comprehensive statutory scheme as one that is extensive, and specifically one that provides plaintiffs with a host of remedial options - monetary damages, attorney's fees, costs, etc. In finding §332(c)(7)'s remedial scheme not to be comprehensive under *Sea Clammers*, the Ninth Circuit emphasized its view that the section's "[s]hortening [of] the statute of limitations to thirty days imposes a burden on an aggrieved plaintiff, not a benefit," and that "[t]he only benefit to an aggrieved plaintiff" under the section is expedited judicial review. Pet. App. 8a; *see also id.* at 9a (referring to §332(c)(7) as "limiting the plaintiff's remedies"). Furthermore, and consistent with its understanding that a comprehensive scheme should maximize a plaintiff's remedial options, the Ninth Circuit reasoned from the absence in §332(c)(7) of any provision for monetary damages *not* that damages are unavailable in suits seeking to enforce §332(c)(7), but instead that damages (and presumably attorneys fees, as well) may be had through resort to §1983: "While one may argue that the lack of any damages [remedy] in [§332(c)(7)] is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a.

Thus, on the Ninth Circuit's view, the fact that a statute limits the relief a plaintiff may obtain - whether expressly (as by prescribing a short limitations period) or implicitly (as by omitting an express damages provision) - in and of itself indicates that the statute's scheme is not comprehensive under *Sea Clammers*, and that §1983 thus remains available. As we will demonstrate below, the Ninth Circuit' reasoning is flawed on several levels.

A. *Sea Clammers* And Its Progeny Establish A Clear Rule: Where A Substantive Statute Authorizes Individualized Judicial Review, Its Remedial Scheme May Not Be Circumvented Through Resort To §1983.

The logic underlying the Ninth Circuit's specific decision concerning §332(c)(7) - that limitations on a plaintiff's right of recovery under a statute's remedial scheme render that scheme insufficiently comprehensive to preclude §1983 enforcement - cannot be squared with *Sea Clammers* or the decisions that follow it. Those decisions, we will show, focus not on the procedural rules by which a plaintiff must abide in bringing his cause of action, or the relief to which he is (or is not) entitled under that cause of action, but, instead, on the fact that the plaintiff has a cause of action in court at all. More specifically, the cases demonstrate that where Congress goes to the trouble of expressly establishing a private cause of action to enforce a statute's directives - at least where, as here, that cause of action entails some of form of individualized *judicial* review - the rules, restrictions, and remedies that attend that cause of action govern, and may not be circumvented through resort to §1983's generic terms. A cause of action for judicial review, that is, might not be a *necessary* condition to a finding of comprehensiveness, but it is, this Court's cases show, a *sufficient* condition.

1. The plaintiffs in *Sea Clammers* sued under §1983 for monetary damages stemming from violations of two federal environmental statutes. In finding those statutes' remedial schemes sufficiently comprehensive to preclude resort to

§1983, this Court (as it has since described its decision) "emphasized that several provisions of the Act[s] authorized private persons to initiate enforcement actions." *Blessing v. Freestone*, 520 U.S. 329, 347 (1997) (citing *Sea Clammers*, 453 U.S. at 14, 20). More particularly, the statutes "allow[ed] suits" in federal court "by private citizens." *Sea Clammers*, 453 U.S. at 6. By invoking §1983, the plaintiffs there sought to circumvent two limitations on the prescribed causes of action: (i) a requirement that "citizen plaintiffs must first give notice" of their suits to both EPA and the alleged environmental violator 60 days before filing; and (ii) the statutes' authorization of prospective injunctive, but not monetary, relief. *Id.* at 7. Notably, those limitations are similar to the ones the Ninth Circuit found decisive here – namely, (i) the 30-day filing period and (ii) the lack of any statutory damages remedy. But while the Ninth Circuit found that those limitations rendered §332(c)(7)'s remedial scheme insufficiently comprehensive to preclude resort to §1983, this Court in *Sea Clammers* reached precisely the opposite conclusion. It held that the environmental statutes' remedial schemes – which, again, expressly authorized individual "citizen suits" in federal court – *were* comprehensive despite the restrictions on recovery. Indeed, the whole point in *Sea Clammers* was to preserve the underlying statutes' express causes of action, limitations and all: "[T]he requirements of th[ose] enforcement procedure[s]," this Court held, "may not be bypassed by bringing suit directly under §1983." *Id.* at 20 (internal quotation marks omitted).

2. *Smith v. Robinson*, 468 U.S. 992 (1984), is to the same effect. The plaintiffs there had sued to enforce their rights under the Education of the Handicapped Act and the Fourteenth Amendment. The EHA, this Court has since summarized, expressly provided for "local administrative procedures followed by federal judicial review." *Blessing*, 520 U.S. at 347 (citing *Smith*, 468 U.S. at 1009). But because, like §332(c)(7) here, the EHA gave "no indication that attorney's fees [we]re available in an action to enforce [its]

requirements," 468 U.S. at 1006, the plaintiffs in *Smith* (like the respondent here) sought fees under §1983's fee-shifting provision, §1988. This Court rejected that move. Despite the absence of any provision for fees in the EHA's remedial regime, this Court found that regime to be comprehensive and refused the plaintiffs' effort to "circumvent" the EHA's "carefully tailored scheme" by seeking fees directly through §1983. *Id.* at 1012. Notably for present purposes, this Court in *Smith* observed (echoing the First Circuit's decision, which it affirmed) that *Sea Clammers* stands for the "general proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme" – like the absence of any provision for the payment of attorney's fees – "should not be supplanted by the remedial apparatus of §1983." *Id.* at 1003.

3. Neither *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), nor *Blessing v. Freestone*, 520 U.S. 329, supports the Ninth Circuit's decision here. This Court found the statutes at issue in those cases insufficiently comprehensive to preclude resort to §1983 because they provided only for administrative enforcement by executive agencies (for instance, through the withholding of federal funds); none authorized a private cause of action through which an aggrieved individual could seek redress in court. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 427. Indeed, the Court in *Wright* distinguished *Sea Clammers* and *Smith* for the very reason that the statutes in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the §1983 remedy." *Id.*; *see also id.* at 423 (*Sea Clammers* involved "scheme that itself provided for private actions"); *id.* (*Smith* concerned remedial scheme "which itself allowed private parties to seek remedies for violating federal law"). So, too, in *Wilder*, the Court contrasted *Sea Clammers* and *Smith* and emphasized that the statute before it "contain[ed] no comparable provision for private judicial or administrative enforcement." 496 U.S. at

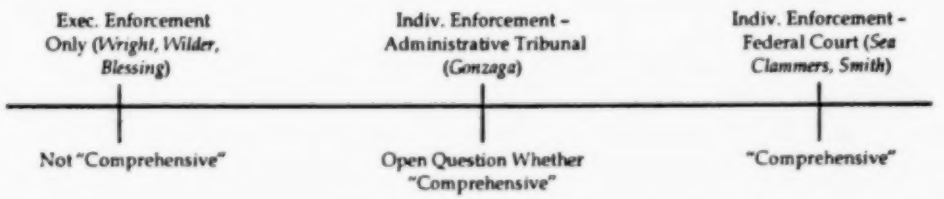
521. And in *Blessing*, the Court likewise stressed that "[u]nlike the federal programs at issue" in *Sea Clammers* and *Smith*, the statute before it "contain[ed] no private remedy – either judicial or administrative – through which aggrieved persons can seek redress." 520 U.S. at 348.

The remedial schemes at issue in *Wright*, *Wilder*, and *Blessing*, therefore, were all fundamentally different from §332(c)(7). Whereas those cases "involved statutes that relied on executive branch enforcement with little, if any, possibility for private enforcement," §332(c)(7) *"relies entirely on private enforcement."* Jacques & Beermann, *supra* at 1, at 754 (emphasis added). Here, the Ninth Circuit itself acknowledged that §332(c)(7) provides for a private cause of action "by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction ...." Pet. App. 6a. Under this Court's decisions, that fact alone is sufficient to preclude suit under §1983; that §332(c)(7)'s cause of action is in some sense circumscribed – for instance, by requiring suit within 30 days and by not providing for damage awards and attorney's fees – does not, as the Ninth Circuit assumed, detract from its comprehensiveness.

4. To summarize, this Court's cases – from *Sea Clammers* to *Blessing* (and beyond) – have dealt with a range of remedial schemes that can be plotted fairly neatly along a continuum. *See* Fig. 1, *infra*. At one end are *Wright*, *Wilder*, and *Blessing*, in which the pertinent statutes depended entirely on agency enforcement and made essentially no provision for private enforcement, "either administrative or judicial." *Blessing*, 520 U.S. at 348. Such statutes, this Court has held, do not entail remedial schemes sufficiently comprehensive to preempt §1983's generic cause of action. In the middle, so to speak, is *Gonzaga University v. Doe*, 536 U.S. 273 (2002); the statute there offered persons aggrieved the right to file "individual written complaints" – but in an administrative, rather than judicial, forum. *Id.* at 289. This Court left open (and may comfortably bypass again today) the question whether that sort of individualized administrative review apparatus is comprehensive in the *Sea*

Clammers sense. *See id.* at 290 n.8.[2] *Sea Clammers* and *Smith* – and, as should become clear, this case – occupy the opposite pole. Like §332(c)(7), the statutes at issue in those cases expressly provided for judicial consideration of individual claims, either as an initial matter or on appellate-like review. And in both cases, the Court found the remedial schemes sufficiently comprehensive to preclude resort to §1983.

Figure 1



Thus, for present purposes, this Court's decisions establish a bright-line rule: Where Congress expressly establishes in a substantive statute a private cause of action through which an aggrieved party can seek redress *in court* (as it did in *Sea Clammers* and *Smith* but did not in *Wright*, *Wilder*, or *Blessing*), the specific procedures, remedies, and restrictions prescribed by that statute govern the operation of the cause of action, and may not be circumvented through resort to §1983's general terms. Put simply, a plaintiff whom Congress has expressly authorized to sue in court on a statutory violation *takes his cause of action as he finds it*. There is no point in getting bogged down in a debate about what forms of relief (damages, fees, etc.) the cause of action does or does not provide. The express cause of action *itself* – at least, where, as here, it authorizes individual suits in federal court – precludes reliance on §1983.[3]

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[2] The United States has argued that it is. *See* Br. for the United States at 23-27, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (No. 01-679). Amici concur in that view; but, again, the Court needn't address that situation here.

[3] Whether or not a mechanism for judicial review in *state* court (alone) would be sufficiently comprehensive to preempt §1983 is perhaps an open question. *See Wright*, 479 U.S. at 440-41 (O'Connor, J., dissenting) (clear avenue to state court would be sufficient). The Court need not address

Because it expressly "provides a mechanism for judicial relief," H.R. Conf. Rep. No. 104-458, at 208 (Jan. 31, 1996), §332(c)(7) fits squarely within the *Sea Clammers-Smith* category of statutes that preempt §1983. The Ninth Circuit acknowledged that §332(c)(7) provides aggrieved plaintiffs a private cause of action by allowing them to sue "in any court of competent jurisdiction" (Pet. App. 6a), but went on to permit resort to §1983 anyway. In so doing, the Ninth Circuit sanctioned the very sort of end run that this Court's decisions prohibit.

B. The Clear Rule Established By The *Sea Clammers* Line Of Cases Is Consistent With This Court's Decisions In Related Contexts.

The principle that emerges from the *Sea Clammers* line of cases – that where Congress has expressly created a private cause of action and assigned to it particular procedures and remedies, a plaintiff cannot circumvent those specific rules through resort to §1983 – is part of a bigger picture. Under the banner that a "specific" statute should be read to govern the "general," this Court has enforced similar rules to foreclose §1983 suits in other contexts.

Section 1983's language, of course, is broad. It provides that any person who, acting under the color of state law, deprives another of "his rights, privileges, or immunities secured by the Constitution and laws" of the United States shall be liable "in an action at law, suit in equity, or other proper proceeding for redress." This Court has made clear, though, that §1983's broad language cannot be read literally, else it would swallow up – and displace – other, more specific remedial schemes. Perhaps most notable in this respect have been this Court's decisions concerning the "intersection," or "overlap," of §1983 and the federal habeas corpus statute, 28 U.S.C. §2254. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994);

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that question today, as §332(c)(7) expressly provides for judicial review in *federal* court at a plaintiff's option.

Edwards v. Balisok, 520 U.S. 641 (1997); *Muhammad v. Close*, 540 U.S. 749 (2004). In the first in that line of cases, *Preiser v. Rodriguez*, this Court faced §1983 suits by state prisoners seeking the restoration of good-time credits they claimed had been unconstitutionally revoked. The inmates had sued under §1983 to avoid having to exhaust their state remedies, as the habeas statute expressly requires, *see* 28 U.S.C. §2254(b). "The question before us," this Court said, "is whether state prisoners seeking such redress may obtain equitable relief under [§1983], even though the federal habeas corpus statute, 28 U.S.C. §2254, clearly provides a specific federal remedy." 411 U.S. at 477. In answering that question in the negative, the Court stressed that "[t]he broad language of §1983 ... is not conclusive ...." *Id.* at 489. Emphasizing that "[t]he [§1983] statute is a general one," the Court held that, "despite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute ... must be understood to be the exclusive remedy in a situation like this where it so clearly applies." *Id.*

This case presents a similar issue, albeit in a different context. Under what circumstances is §1983 available to a plaintiff claiming that a state or local official deprived him of a right created by a federal statute? And, more to the point, when may a plaintiff resort to §1983's generic cause of action rather than utilize the specific cause of action – and accompanying procedures and remedies – available to him under the particular statute he seeks to enforce?

The Ninth Circuit's answer to that question – seemingly, that unless the underlying statute provides not only an avenue into federal court but also the full panoply of remedial options, it cannot be sufficiently comprehensive to preclude resort to §1983 – cannot be squared with this Court's approach to §1983 in the *Preiser-Heck* line of cases. The issue in those cases has never been whether the habeas statute is sufficiently beneficial or advantageous to the complaining inmate (with the result that, if not, §1983 steps in to provide a more robust remedy). In fact, just the opposite is true. The fundamental question in that line of

cases has been whether an inmate may circumvent a specific *limitation* on the habeas statute's express cause of action – typically, the requirement that he exhaust state remedies – by resort to the more general, and more permissive, §1983. *See, e.g., Heck*, 512 U.S. at 480-81; *Preiser*, 411 U.S. at 489-90. This Court has consistently answered no. In *Preiser*, the Court held that "[i]t would wholly frustrate explicit congressional intent to hold that [inmates] could evade [the habeas statute's] requirement[s] by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. Rather, the Court emphasized, where it "clearly applies," the specific habeas statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – "must be understood to be the exclusive remedy available …." *Id.* at 489; *see also Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ….").

The Ninth Circuit's analysis here invites the very "frustrat[ion] of explicit congressional intent" that this Court has condemned in the *Preiser-Heck* cases. *See* Jacques & Beermann, *supra* at 1, at 750 (noting the similarities between §1983's interaction with §332(c)(7) and the habeas statute). Again, citing the short 30-day statute of limitations (which it called "a burden on an aggrieved plaintiff, not a benefit") and the "lack of any damages" remedy (or provision for fees), the Ninth Circuit found §332(c)(7)'s remedial scheme not to be comprehensive and, accordingly, held that §1983 must be available. Pet. App. 8a. And again, with respect to the latter issue, the court expressly assumed that the absence of any express provision in the Communications Act for damages implied *not* that Congress "intended to foreclose damages," but instead that Congress "intended to preserve an aggrieved plaintiff's right to invoke §1983." *Id.* at 7a. But that is like saying that because the federal habeas statute imposes an exhaustion requirement, *see* 28 U.S.C. §2254(b), or does not authorize damage awards, *see Preiser*, 411 U.S. at 494, inmates must be able to invoke §1983, which entails

neither limitation. This Court has squarely rejected that view. *See, e.g., Heck*, 512 U.S. at 483-87; *Preiser*, 411 U.S. at 489-90. The same considerations counsel rejection of the logic underlying the Ninth Circuit's decision here.

C. The Ninth Circuit's "More Is Better" Approach To Comprehensiveness Is Unworkable And Risks Rendering *Sea Clammers* A Dead Letter.

Setting aside its inconsistency with this Court's precedent, the Ninth Circuit's "more is better" approach to comprehensiveness is unworkable and, indeed, has the potential to swallow the *Sea Clammers* rule entirely.

1. The Ninth Circuit's decision concerning §332(c)(7)'s comprehensiveness rests on its belief that the statute imposes too many limitations, and confers too few benefits, on telecommunications plaintiffs. While acknowledging that §332(c)(7) provides for a private cause of action in court (Pet. App. 6a), the Ninth Circuit's opinion repeatedly says, for instance, that §332(c)(7) "does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs" (*id.* at 5a), "grants no remedies beyond procedural rights" (*id.* at 6a), "does not provide for any type of relief" (*id.* at 7a), and "contains no remedies at all" (*id.*). Now, as we explain below, the Ninth Circuit's assumption that §332(c)(7) permits no remedy whatsoever – not even simple injunctive relief – is unwarranted; the courts of appeals have held (uniformly) that injunctive relief, in the form of an order directing local zoning authorities to permit construction, is available under §332(c)(7). *See infra* at 17. But the point remains: In the Ninth Circuit's view, §332(c)(7) just doesn't provide sufficient benefits to plaintiffs to be comprehensive in the *Sea Clammers* sense.

But when, under that "standard," does a remedial scheme become comprehensive? What if §332(c)(7) authorized monetary damage awards, but not attorney's fees? Fees, but not damages? Damages and fees, but not costs? When, on the Ninth Circuit's view, is enough, enough? And mightn't the answer to that question vary

from case to case, statute to statute? The same problem infects the Ninth Circuit's emphasis on §332(c)(7)'s 30-day statute of limitations, which, it says, "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. What if the limitations period were 90 days? Or 180? Or a year? Again, at what point is long enough, long enough? The Ninth Circuit's approach to comprehensiveness offers no principled basis for distinguishing one statutory cause of action (with its particular package of rules and remedies) from the next. It would leave the lower courts to decide *Sea Clammers* issues on an ad hoc, case-by-case basis, and would plunge the law into a state of disarray.

By contrast, the rule suggested by the *Sea Clammers* line of cases offers courts clear guidance: Wherever Congress establishes in a substantive statute an express cause of action for judicial review, that cause of action – with its attendant rules and remedies – controls, and may not be circumvented through resort to §1983. Again, there is no need to quibble over the plaintiff-friendliness of the prescribed procedures and available forms of relief. The plaintiff takes his cause of action as he finds it – and as Congress crafted it.

2. The Ninth Circuit's "more is better" approach suffers from an additional problem. Taken to its logical extreme, the Ninth Circuit's view seems to be that *any* restriction on a plaintiff's ability to recover under a substantive statute's express cause of action – whether a short limitations period, the absence of a damages remedy or fees, or some other – is a basis for finding that §1983 remains available. But by that logic, the whole *Sea Clammers* line of cases evaporates. If, as the Ninth Circuit's decision suggests, any supposed limitation in an underlying statute's remedial scheme could be bridged by resort to §1983, then *Sea Clammers* would have no independent force at all; a statute's remedial scheme would be sufficiently comprehensive to preclude resort to §1983 only when it provided the full complement of remedies (*e.g.*, injunctions, damages, fees) available under §1983 – that is, *only when resort to §1983 would be wholly unnecessary and superfluous.*

But as one Justice observed during oral argument in *Gonzaga*, for a remedial scheme to be comprehensive in the *Sea Clammers* sense, and thus to preempt §1983, it "certainly … doesn't have to be a duplicate of section 1983, or there would be no point in saying it supplants it." Tr. of Oral Arg. 34. Rather, like the *Preiser* rule that preceded it, the *Sea Clammers* rule has bite only when it is used to enforce – and to prevent plaintiffs from "bypass[ing]"or "circumvent[ing]" – limits embodied in underlying statutes' remedial schemes. *Smith*, 468 U.S. at 1012; *Sea Clammers*, 453 U.S. at 20. By using those same limits (here, a short statute of limitations and the absence of a damages remedy) to justify dispensing with the *Sea Clammers* rule and permitting resort to §1983, the Ninth Circuit's decision risks extinguishing the *Sea Clammers* rule altogether.

D. Reliance On §1983 Is Unnecessary To The Vindication Of §332(c)(7)'s Purposes, Will Give Plaintiffs' Lawyers A Windfall, And Will Frustrate The Efficient Deployment Of New Technology.

Resort to §1983 in this case is not just inconsistent with *Sea Clammers*, but is also unnecessary to the achievement of §332(c)(7)'s objectives. In case after case, wireless operators have sued to enforce §332(c)(7)'s substantive provisions – and won – without relying on §1983. *See, e.g., New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403 (3d Cir. 1999); *Cellular Tele. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *see also* Jacques & Beermann, *supra* at 1, at 754 & n.102 (collecting district court cases). Further, the courts of appeals have held (to our knowledge, uniformly) that injunctive relief – specifically, an order directing the relevant state or local zoning authority to permit construction – is available under §332(c)(7). *See New Par*, 301 F.3d at 399-40; *National Tower*, 297 F.3d at 21-22; *Preferred Sites*, 296 F.3d at 1221-22;

Omnipoint, 181 F.3d at 410; *Town of Oyster Bay*, 166 F.3d at 497. Indeed, it bears emphasis that the respondent here, Mr. Abrams, prevailed on his §332(c)(7) claim in the district court, which entered a "judgment of injunction" expressly "enjoin[ing], mandat[ing] and compell[ing]" the City to "set aside its earlier resolution denying plaintiff's application" and to "adopt a new resolution granting" that application. Pet. App. 13a-14a.

If, as seems clear, wireless operators like Mr. Abrams can obtain the regulatory approvals they seek through expedited suits for injunctive relief directly under §332(c)(7), what is fueling the recent rush to §1983? The answer seems to us plain enough: *attorney's fees*. Pursuant to the so-called "American rule," attorney's fees are not available under §332(c)(7); 42 U.S.C. §1988, by contrast, expressly authorizes fee awards in suits brought under §1983. Plaintiffs' lawyers thus have an obvious preference for §1983 over §332(c)(7), and an obvious incentive to file their §332(c)(7) suits under §1983's cover. But for three reasons, paying plaintiffs' lawyers' bills seems to us a hollow (if not perverse) reason for disregarding the specific cause of action that Congress established in §332(c)(7) in favor of §1983's more permissive scheme.

1. First, a word about §332(c)(7) plaintiffs. The point of §1988 was to protect the proverbial little guys. As the Senate report accompanying §1988 observes, "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (June 29, 1976). Congress was concerned that "[i]f the cost of private enforcement actions bec[ame] too great, there w[ould] be no private enforcement" and "our civil rights laws" would "become mere hollow pronouncements." *Id.* at 6, 1976 U.S.C.C.A.N. at 5913. But there is little danger that without the prospect of fees §332(c)(7) would become a "hollow pronouncement[]." The telecommunications conglomerates that are typically the plaintiffs in §332(c)(7) cases hardly fit

the mold of the little-guy civil-rights victims Congress had in mind when it enacted §1988. *See PrimeCo Personal Communications Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (Posner, J.) (whereas §1988 was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers in cases whose social and political significance may dwarf the monetary stakes," "telecommunications enterprises" "have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes"); *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir. 2000) (Carnes, J., concurring), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed*, 264 F.3d 1314 (2001) (whereas "Section 1988 was intended to help the civil rights Davids of the world do battle with the governmental Goliaths," telecommunications companies' "financial self-interest and the vast sums at stake make them more than happy to serve as 'private attorneys general' to enforce the legislative measures that they have lobbied through Congress"). *Cf. Dennis v. Higgins*, 498 U.S. 439, 464 (1991) (Kennedy, J., dissenting) (§1988 fee awards should not "merely shift[] the balance of power away from the States and toward interstate businesses").

2. Second, a word about §332(c)(7) defendants. By definition, claims under §332(c)(7) will be against state and local government bodies. More often than not, the defendants will be cash-strapped municipalities doing their level best to discharge their zoning and land-use responsibilities consistently with §332(c)(7)'s dictates. We will leave it to the local government amici to explain in detail the deleterious effects that large attorney's fees awards have had - and would continue to have were the Ninth Circuit affirmed here - on municipal governments. *See, e.g.*, Br. of the National League of Cities, *et al.*, at 11 (certiorari stage) (Localities "face a serious, and potentially disastrous, financial burden if they are required to pay damages and attorneys' fees for inadvertent violations of a specialized federal statute."). For present purposes, it

suffices to state the obvious: that fee awards "may penalize cities and towns that, in good faith, attempted to limit cell towers in ways that ultimately are determined to violate" §332(c)(7), and that even "[t]he potential for substantial awards of attorney's fees may illegitimately deter state and, especially, small local governmental units from exercising their rightful zoning authority." Jacques & Beermann, *supra* at 1, at 770. The sheer *in terrorem* effect of oppressive fee awards (and, for that matter, damage awards) may well be enough to convince small municipalities to get out of the tower-siting business altogether – precisely what Congress did *not* want when it set out in §332(c)(7) to "[p]reserve ... local zoning authority."

3. Finally, a word about systemic impact. This Court has often remarked (with regret) the tendency of attorney's-fees requests to "result in a second major litigation." *E.g.*, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 (2001); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The risk of cases bogging down in disputes over fees is particularly acute in the current context given Congress' stated purpose of "encourag[ing] the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), and §332(c)(7)(v)'s express requirement that siting disputes be resolved "expedit[iously]." *See also* H.R. Conf. Rep. 104-458, at 1 ("designed to accelerate rapidly private sector deployment"); *id.* at 113 ("accelerate rapidly"); H.R. Rep. No. 104-204(I), at 47, *reprinted in* 1996 U.S.C.C.A.N. 10, 11 (July 24, 1995) ("rapid deployment"); *id.* at 94, 1996 U.S.C.C.A.N. at 61 ("speed deployment"). Indeed, in the light of these concerns, the Eleventh Circuit has emphasized "the developing case law" holding that simple *injunctive* relief – the form of relief that the courts have uniformly held is available under §332(c)(7) itself, *see supra* at 17 – "best serves the [Communications Act's] explicit goal of expediting resolution of this type of action." *Preferred Sites*, 296 F.3d at 1222 n.13.

II. Section 332(c)(7) Does Not Create Private "Rights" Enforceable Under §1983.

Should this Court address (which, in view of the foregoing, it needn't) what *Sea Clammers* calls the "second question" whether 47 U.S.C. §332(c)(7) creates any private "rights" enforceable under §1983, it should answer that it does not.[4]

Not every violation of a federal statute works a deprivation of "rights" within the meaning of §1983. "In order to seek redress through §1983 ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340. With respect to the "rights" issue, the pathmarking decision is *Gonzaga University v. Doe*, 536 U.S. 273. There, this Court firmly rejected any supposition that there is a "loose standard for finding rights enforceable by §1983," or that a plaintiff may "enforce a statute under §1983 so long as [he] falls within the general zone of interest that the statute is intended to protect" or is in some sense "benefit[ed]" by it. *Id.* at 282-83. On the contrary, the Court held, nothing "short of an unambiguously conferred right" will suffice to "support a cause of action brought under §1983." *Id.* at 283. In

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[4] The certiorari-stage briefing – including our own – focused on the comprehensiveness of §332(c)(7)'s remedial scheme for *Sea Clammers* purposes. But the Question Presented – whether §332(c)(7) "may be enforced" via §1983 – "fairly include[s]" the "subsidiary" (and in some senses logically antecedent) question whether §332(c)(7) creates privately enforceable rights at all. Sup. Ct. R. 14.1(a). Moreover, as the United States has correctly observed elsewhere, the "rights" and "remedies" inquiries cannot be "wholly divorced" from one another. *See* Br. for the United States at 23, *Gonzaga*, 536 U.S. 273. By contrast, "the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided." *Id.* As we show in text, the evidence that Congress intended to create §1983-enforceable rights in §332(c)(7) is particularly weak. Whether that weakness is deemed relevant specifically with respect to the "rights" question itself, or derivatively to the "remedies" question, the point is that it *is* relevant to the resolution of this case.

embracing that rigorous standard, the Court looked to its implied-private-right-of-action decisions - with their singular focus on clear congressional intent, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) - to "guide the determination of whether a statute confers rights enforceable under §1983." 536 U.S. at 283. Indeed, the Court clarified that "the initial inquiry - determining whether a statute confers any right at all - is no different" in the §1983 and implied-right-of-action contexts. *Id.* at 285.

Against that backdrop, the Court in *Gonzaga* held that where a statute's "text and structure" give no indication that Congress intended to create new private rights, "there is no basis for a private suit, whether under §1983 or under an implied right of action." *Id.* at 286. Borrowing from the implied-right-of-action cases, the Court emphasized that a statute creating enforceable private rights "must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)). In assessing the statute before it - and finding it wanting - the Court observed that the relevant provisions "entirely lack[ed] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.* at 287 (citing *Sandoval*, 532 U.S. at 288-89, and *Cannon*, 441 U.S. at 690 n.13). Specifically, the Court contrasted the statute before it, which was phrased as a prohibition on government regulators ("No funds shall be made available ...."), with "the individually focused terminology of Titles VI and IX," both of which state that "[n]o person ... shall ... be subjected to discrimination." *Id.* at 284 n.3, 287. In sum, the Court said, "'[s]tatutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons."'" *Id.* at 287 (quoting *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

Gonzaga compels the conclusion that §332(c)(7) does not create §1983-enforceable rights. To start from a somewhat broader perspective, it is settled that the Communications

Act of 1934 "did not create new private rights" and that, by contrast, "[t]he purpose of th[at] Act was to protect the public interest in communications." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942). Nor is there any indication that the Telecommunications Act of 1996 - which, among other things, added §332(c)(7) to the Communications Act - created private, as opposed to public, rights. The 1996 Act's preface describes the statute as an effort to "secure lower prices and higher quality services" for *all* "American telecommunications consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The House and conference reports accompanying the 1996 Act likewise focus not on private interests, but on the collective rights of "all Americans." H.R. Conf. Rep. No. 104-458, at 1; *see also id.* at 113 ("all Americans"); H.R. Rep. No. 104-204(I), at 47-48, 1996 U.S.C.C.A.N. at 11 ("American telecommunications consumers," "American businesses").

The question here, of course, is whether the "specific statutory provision" at issue, 47 U.S.C. §332(c)(7), which was written into the Communications Act as part of the 1996 Act, provides any basis for a contrary conclusion. *See Blessing*, 520 U.S. at 342 ("particular provision"). Measured against *Gonzaga*'s rigorous standard, it is clear that it does not.

A. Section 332(c)(7) Contains No "Rights-Creating" Language.

There is certainly no basis in §332(c)(7)'s text for finding a congressional intent to create private rights enforceable via §1983. All of the relevant provisions of §332(c)(7) are addressed to the entities being regulated (here, state and local zoning authorities) rather than to those seeking protection (here, wireless operators). Subsection (A) opens with a general reaffirmation of local zoning authority: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government, or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Subsection (B) then

imposes several "[l]imitations" on local zoning authority. For instance –

- A "State or local government or instrumentality thereof … shall not" through regulation either (i) "unreasonably discriminate among providers of functionally equivalent services" or (ii) "prohibit or have the effect of prohibiting the provision of wireless services." §332(c)(7)(B)(i).
- A "State or local government or instrumentality thereof shall" act on siting and construction requests "within a reasonable period of time … taking into account the nature and scope of such request[s]." §332(c)(7)(B)(ii).
- Any decision of a "State or local government or instrumentality thereof" to deny a siting or construction permit "shall be in writing and supported by substantial evidence contained in a written record." §332(c)(7)(B)(iii).

Significantly for present purposes, all of §332(c)(7)'s substantive provisions "focus on the person regulated rather than the individuals protected." *Gonzaga*, 536 U.S. at 287. They are framed as directives to local zoning officials – prohibitions in some cases, commands in others – *not* as guarantees to individuals. Accordingly, and in stark contrast to statutes like Titles VI and IX, §332(c)(7)'s substantive provisions "entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.*; *see also id.* at 291 (Breyer, J., concurring in the judgment) (emphasizing "total absence (in the relevant statutory provision) of any reference to individual 'rights' or the like"). Indeed, the absence in §332(c)(7) of any rights-creating language is, if anything, more damning than the similar void in *Gonzaga*. Unlike the statute there, which had been enacted in 1974 during the so-called "*ancien regime*," *Sandoval*, 532 U.S. at 287, when courts took a relatively loose approach to inferring private statutory rights, §332(c)(7) was enacted in

1996, by which time this Court was consistently requiring (at least in its implied-right-of-action decisions) a clear showing of congressional intent to create enforceable rights, *see, e.g.*, *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988).

This, moreover, is not a case in which §1983-enforceable rights can be discerned through reference to "'the entire legislative enactment.'" *Gonzaga*, 536 U.S. at 296 (Stevens, J., dissenting) (quoting *Suter v. Artist M.*, 503 U.S. 347, 357 (1992)). In *Gonzaga*, Justice Stevens pointed to the use of the term "rights" in the title of the pertinent statute (the "Family Educational *Rights* and Privacy Act") and to the "substantial number of references to 'rights'" in the statutory sections surrounding the provision specifically at issue. *Id.* at 293-94, 296. Here, statutory structure provides no such aid. The word "right" does not appear anywhere in §332, let alone in §332(c)(7) or (c)(8), the two subsections added by the 1996 Act. *See* Pub. L. No. 104-104, §§704(a), 705, 110 Stat. 56, 151-52 (1996). Nor does any of the section headings suggest a focus on private rights: §332 itself is titled "Mobile services"; subsection (c), "Regulatory treatment of mobile services"; and sub-subsection (c)(7), "Preservation of local zoning authority."

B. Section 332(c)(7)'s Provisions Are Too Vague To Create §1983-Enforceable Rights.

The absence of rights-creating language aside, there is another, separate reason that §332(c)(7) should not be read to create private rights for §1983 purposes. Its substantive provisions, by and large, are simply too "'vague and amorphous'" give rise to enforceable rights. *Blessing*, 520 U.S. at 340 (quoting *Wright*, 479 U.S. at 431-32); *see also Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment) ("Much of the statute's key language is broad and nonspecific."). For instance, §332(c)(7)(B)(i) prohibits local zoning authorities from "unreasonably discriminat[ing]" between providers and from regulating in such a way as to "have the effect of prohibiting" wireless service. But what constitutes "unreasonabl[e] discriminat[ion]"? And when

does local regulation "have the effect of prohibiting" wireless service? Likewise, §332(c)(7)(B)(ii) requires local zoning authorities to act on construction requests within "a reasonable period of time," "taking into account the nature and scope of the request[s]." But what might that "reasonable period" be in any given case?

Those questions are not answered either in the statute itself or in any relevant regulation. This case, therefore, is different from both *Wright* and *Wilder*, in which the Court found enforceable private rights in statutory provisions that centered on the vague term "reasonable." In those cases, either the statutes themselves or their implementing regulations (or both) "specifically set out guidelines" or "factors" for courts to consider in measuring reasonableness. *Wright*, 479 U.S. at 431; *Wilder*, 496 U.S. at 519 & n.17. Here, by contrast, neither §332(c)(7) itself nor an applicable regulation gives any hint as to the meaning, for instance, of the terms "unreasonabl[e] discriminat[ion]," "effect[ive] prohibit[ion]," or "reasonable period." This case, accordingly, is like *Suter v. Artist M.*, 503 U.S. 347, in which this Court held that a federal welfare statute's requirement that States make "reasonable efforts" to prevent the removal of foster children from their homes was too vague to create §1983-enforceable rights. Here, as there, "[n]o further statutory guidance is found as to how" amorphous statutory standards "are to be measured." *Id.* at 360.

Nor does the legislative history offer any meaningful clarification of §332(c)(7)'s vague terms. In fact, with respect to several of those terms, the legislative history only compounds the uncertainty. For instance, with respect to "unreasonabl[e] discriminat[ion]," the conference report merely states that §332(c)(7)(B)(i) gives "localities the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." H.R. Conf. Rep. 104-458, at 208. As to "effect[ive] prohibit[ion]," the report simply expresses the conferees' intent that "decisions be made on a case-by-case basis." *Id.*

And on the meaning of the phrase "reasonable period of time," the report offers only that it is the "usual period under [local zoning] circumstances" for a hearing, variance, etc., and that requests need not be subjected "to any but the generally applicable time frames for zoning decision[s]." *Id.*

C. Principles Of Federalism Counsel Against Finding §1983-Enforceable Rights In §332(c)(7).

In refusing to find enforceable private rights in *Gonzaga*, this Court declined to indulge any "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials." 536 U.S. at 286 n.5. So, too, here, recognition of federally-enforceable private rights in §332(c)(7) would undermine a long "tradition of deference" to local zoning and land-use decisions. This Court has repeatedly held that "zoning laws and their provisions ... are peculiarly within the province of state and local legislative authorities," *Warth v. Seldin*, 422 U.S. 490, 508 n. 18 (1975), and, indeed, that "regulation of land use is perhaps the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 768 n. 30 (1982). Additionally, this Court has recognized that because "[t]he zoning function is traditionally a governmental task requiring the 'balancing [of] numerous competing considerations,'" courts "should properly 'refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.'" *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)).

The affront to federalism would be, if anything, more pronounced here than in *Gonzaga*. Not only is there "no basis in statutory text," 536 U.S. at 286 n.5, to believe that Congress intended to *upset* the deference traditionally owed to state and local land-use decisions, the relevant evidence shows that Congress actually intended, as §332(c)(7)'s title plainly states, to "*[p]reserv[e]* ... local zoning authority." Section 332(c)(7)(A), for starters, establishes the general rule

that §332 does not "limit or affect" local zoning and land-use authority. And, indeed, the legislative history demonstrates that even §332(c)(7)(B)'s several "[l]imitations," far from *displacing* traditional local zoning standards, actually *incorporate* those standards. For instance, §332(c)(7)(B)(i)'s ban on "unreasonabl[e] discriminat[ion]" was specifically designed to "provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted *under generally applicable zoning requirements*." H.R. Conf. Rep. No. 104-458, at 208 (emphasis added). Likewise, in requiring local zoning boards to act on construction requests "within a reasonable period of time," §332(c)(7)(B)(ii), Congress intended merely to subject those requests to "the generally applicable time frames for zoning decision[s]" and, thus, to require decisions within the "usual period under [local zoning] circumstances." *Id.* Accordingly, a decision finding §1983-enforceable rights in §332(c)(7) would federalize large swaths of local zoning practice without any indication in the statute that Congress intended such an incursion – and, indeed, in the face of an apparent contrary intention.

D. Section 332(c)(7)'s Limited Judicial Remedy Does Not Indicate The Existence Of §1983-Enforceable Private Rights.

Section 332(c)(7)(B)(v) – discussed in detail above, *see supra* at 5-20 – provides to "any person adversely affected" by a local zoning board's decision a limited cause of action "in any court of competent jurisdiction." That subsection does not, as some have casually suggested, "compel[] the conclusion that the [Telecommunications Act] was intended to grant providers at least some enforceable rights." Jacques & Beermann, *supra* at 1, at 753. Rather, subsection (v) merely gives aggrieved individuals *standing* to go into court to vindicate the public rights that the Act protects. In *Scripps-Howard Radio v. FCC*, 316 U.S. 4, this Court addressed a statute that, like §332(c)(7)(B)(v), granted judicial review to persons whose interests were "adversely affected."

Observing that the Communications Act "did not create new private rights" but instead sought "to protect the public interest in communications," the Court emphasized that Communications-Act plaintiffs do not sue to vindicate their own private rights but, rather, "have standing only as representatives of the public interest." *Id.* at 14. Subsequently, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), this Court clarified that *Scripps-Howard*'s "standing" reference was addressed not to the Article III inquiry but, instead, to the character of the rights protected by the Communications Act. *See id.* at 737. Accordingly, "once review is properly invoked" by a Communications-Act plaintiff with Article III standing, "that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Id.*

The same is true here. There can be no doubt that a disappointed wireless operator has standing in the Article III sense to challenge a local zoning authority's permit denial. Under the logic of *Scripps-Howard* and *Sierra Club*, §332(c)(7)(B)(v) allows him to go into court to vindicate the publicly-oriented rights that §332(c)(7) protects. The important point for present purposes is that the applicant's standing to sue to enforce §332(c)(7)'s substantive provisions does not alter the nature – *i.e.*, public, not private – of the rights that those provisions protect. Put simply, having standing (and a cause of action) under §332(c)(7) is not the same as having personal, §1983-enforceable private rights under §332(c)(7). *Cf. Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966) (Burger, J.) (Under the Communications Act, "standing is accorded to persons not for protection of their private interest but only to vindicate the public interest.").[5]

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[5] Further indication that §332(c)(7)(B)(v) envisions APA-like actions to enforce public rights is found in §332(c)(7)(B)(iii), which requires that the decisions of local zoning boards be "in writing and supported by substantial evidence contained in a written record." As the conference

Indeed, far from indicating the presence in §332(c)(7) of privately enforceable rights, §332(c)(7)(B)(v)'s limited cause of action actually confirms their absence. In *Gonzaga*, this Court made clear that the existence of a private remedy – even if not comprehensive in the *Sea Clammers* sense – can "buttress[]" a conclusion that a statute does not create §1983-enforceable rights. 536 U.S. at 289. The statute there at issue created within an administrative agency a review board with which aggrieved persons could file "individual written complaints." *Id.* If, based on the complaint, the board found a violation, it could require that the offending educational institution take "specific steps ... to comply" with the statutory mandate. *Id.* Without suggesting any view of whether that enforcement scheme was comprehensive for *Sea Clammers* purposes, this Court emphasized that it was sufficiently different from those at issue in *Wright* and *Wilder*, "where an aggrieved individual lacked any federal review mechanism," to counsel against "finding a congressional intent to create individually enforceable private rights" under §1983. *Id.* at 290.

The same inference – that §332(c)(7) does not create §1983-enforceable private rights – follows a fortiori here. Section 332(c)(7) goes beyond the federal *administrative* review mechanism available in *Gonzaga* to establish a specific and self-contained federal *judicial* review mechanism pursuant to which a person "adversely affected" may "commence an action" in court. *See supra* at 7-12. If the former indicates the absence of §1983-enforceable rights, then surely the latter – which is, if anything, farther removed from the *Wright-Wilder* paradigm – does, as well.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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report observes, "substantial evidence" is the "traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 104-458, at 208.

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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent

On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, AS *AMICUS CURIAE*, SUPPORTING RESPONDENT

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QUESTION PRESENTED

In enacting the right of an individual to place, construct or modify personal wireless facilities in the Telecommunications Act of 1996 (specifically 47 U.S.C. § 332(c)(7) (B)), did Congress intend to foreclose damages against state and local government officials under 42 U.S.C. § 1983 and attorneys' fees under 42 U.S.C. § 1988(b)?

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Mitchell v. United States, 219 Ct. Cl. 95, 591 F.2d 1300 (1979), *reversed and remanded*, 445 U.S. 535 (1980), *on remand*, 229 Ct. Cl. 1, 664 F.2d 265 (1981) (en banc), *affirmed and remanded*, 463 U.S. 206 (1983) 21

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OTHER AUTHORITIES

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S. Rep. No. 94-1011 (1976) 7,8

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INTEREST OF AMICUS CURIAE

Amicus curaie American Mobile Telecommunications Association ("AMTA") is a nationwide affiliation of commercial providers of land mobile and personal wireless services.[1] As such, it and its members are directly affected by the statute here at issue, 47 U.S.C. § 332(c)(7), which Congress enacted in amending the Communications Act of 1934, 47 U.S.C. § 101 *et seq.*, to "promote competition and reduce regulation, to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, Preamble, 110 Stat. 56.

The vast majority of AMTA's members are small, independent, privately owned companies, or individuals. Its members, like respondent Abrams, from time to time apply to municipalities or other local governments for permission regarding "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). To the extent the service provider's application is acted upon by a planning commission or city council which is hostile to the placement of telecommunications facilities, particularly antenna towers, within its jurisdiction or indifferent to the needs of the service provider to have facilities capable of providing adequate personal wireless services to the public, AMTA's members' interests are adversely affected.

The court may take judicial notice of the enormous increase in the demand for and use of personal wireless

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[1]This brief was authored in part by counsel for respondent. No person or entity, other than AMTA, its members and counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have filed blanket consents with this Court to allows the filing of amicus brief.

services. Cellular telephones, once the exclusive province of wealthy persons or business users, have been so prevalent that many parents require their children to carry them for safety reasons. The newest generations of personal wireless services, so-called third generation wireless, now in the process of authorization by the FCC, will have the capability to provide high speed Internet access and full motion video, bringing us only a few steps away from the wrist "TV/radio" Dick Tracy used in the comic strip we read as children.

The high demand for personal wireless services requires that personal wireless service frequencies be reused within limited areas. This reuse of frequencies necessitates numerous low power sites to avoid intra-system interference. Thus the escalation in demand for personal wireless services has resulted in the need to construct towers in all areas in which the public lives or works or though which it travels. The need to locate towers wherever such facilities are permitted pursuant to the laws of the municipality sometimes engenders substantial public concern. These concerns range from typical zoning issues, such as aesthetics, to concerns regarding the possibility of hazardous exposure to radio wave radiation and sometimes to the improper denial of tower siting approval by a municipality.[2]

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[2]For example, the November 18, 2004 edition of the Western Queens Gazette reports, "More than 100 local parents and concerned residents joined City Council member Peter Vallone Jr. and Assembly member Michael Gianaris at a rally protesting cell phone towers in front of 21-80 21st St, directly across from P.S. 122 in Astoria,[New York] last Friday morning. Parents are concerned about the possible effects of the cell phone towers on the health of their children."

Similarly, in April of this year a personal wireless services company was forced to defend before the California Coastal Commission its permit to place a "stealth" antenna at a residential property in Mendocino County, CA. Stealth antennas are designed to alleviate any adverse visual

Although large wireless companies may have the fortitude and financial wherewithal to survive a public onslaught against their antenna tower applications and the resulting delay or denial of their applications, most of AMTA's members would be incapable of absorbing the expense of pursuing the appeals process and, upon denial, to institute a federal district court or state court action to vindicate their rights under Section 332(c)(7)(B).

If the Petitioner prevail, even if a wronged personal wireless service provider who was willing and able to file a court action under the statute were to be successful in challenging the municipality's decision, the only relief he would be entitled to would be a court order directing the municipality to do what it was required to do in the first place. 42 U.S.C. §§ 1983 and 1988(b) help level the playing field to ensure that justice is not merely for the wealthy. A municipality or other local government would be much more inclined to consider a personal wireless service provider's application fairly and on the merits, knowing that it could otherwise be held liable for the applicant's damages and legal fees resulting from an unlawful denial. Absent such a possibility, a municipality generally opposed to towers would have no incentive to fairly abide by the provisions of 47 U.S.C. § 332(c)(7)(B), particularly in the face of vigorous local public opposition. The politically expedient course for local elected officials would be to sit on a protested application and/or pretextually deny it. In that event a wrongfully delayed or

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impact of an antenna by disguising the antenna to look like a tree or other object, or locating the antenna inside a church steeple, or billboard. The principal issue raised by the petitioners concerned radio frequency exposure. Despite that Section 332(c)(7)(B)(iv) preempts radiation exposure concerns, the California Coastal Commission spent several months researching the appeal before affirming award of the permit. *See* http://safecellularphones.com/article2601.html.

denied applicant likely would abandon its proposed tower site. Suing the local government is likely to be more costly than finding an alternative, though inferior, site, or simply giving up.

AMTA thus submits this amicus curaie brief in support of respondent Mark Abrams.

STATEMENT

A. Factual Background

The factual background of this case is adequately set forth in the briefs filed by the Petitioners and Respondent, and in the Ninth Circuit's opinion. We note that no material facts appear to be in dispute.

B. Statutory Framework

This case requires the Court to interpret the interplay between the 47 U.S.C. § 332(c)(7), 42 U.S.C. § 1983 and 42 U.S.C. § 1988(b). Section 332(c)(7) is part of the Telecommunications Act of 1996 (hereinafter "TCA"). The TCA was enacted "to provide for a pro-competitive de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced communications and information technologies and services ... by opening all telecommunications markets to competition." Although generally a preemptive statutory scheme, Congress enacted § 704 of the Act, codified at 47 U.S.C. §332(c)(7), which generally preserves police power zoning jurisdiction over the physical facilities of personal wireless facilities, but nevertheless imposes important limits on State and local governmental authority to restrict or deny operation of wireless personal service facilities.

Section 332(c)(7)(B) provides five specific protections to personal wireless service providers. First, in regulating "the placement, construction, and modification of personal wireless service facilities" states, local governments and instrumentalities thereof may not "unreasonably discriminate among providers of functionally equivalent services;" and may not "prohibit or have the effect of prohibiting the provisions of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i). Second, State and local authorities must act on a tower siting request within a reasonable time, "taking into account the nature and scope of such request." *Id.* at § 332(c)(7)(B)(ii). Third, any denial of a tower siting request must be in writing and supported by substantial evidence. *Id.* at § 332(c)(7)(B)(iii). Fourth, to the extent personal wireless facilities comply with the FCC's radiation exposure regulations, State and local authorities may not regulate such facilities on the basis of possible harm from electromagnetic radiation exposure. *Id.* at § 332(c)(7)(B)(iv). Fifth, Congress gave disappointed applicants for personal wireless tower facilities a federal cause of action to redress a violation of the foregoing rights. *Id.* at § 332(c)(7)(B)(v).

It is the effect of that fifth provision which this case considers. That fifth provision reads as follows:

> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or

> instrumentality thereof that is inconsistent with clause (iv) may petition the [Federal Communications] Commission for relief.[3]

Section 332(c)(7)(B) thus grants personal wireless service providers a federal right: (1) not to be subject to unreasonable discrimination in their tower siting requests; (2) to have their tower siting requests acted upon within a reasonable time; (3) to have any denial of their tower siting requests in writing and supported by substantial evidence; and (4) not to have the denial of their tower siting requests based on concern over radiation exposure if they meet the requirements of the FCC's electromagnetic radiation exposure regulations.[4]

The issue to be decided in this case is whether in enacting the federal cause of action set forth in § 332(c)(7)(B)(v) to enforce the rights granted personal service providers, Congress intended to deny the damage remedy available under § 1983 and intended to deny the award of attorneys' fees available to prevailing plaintiffs under § 1988(b).

Section 1983, creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States. It reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

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[3]47 U.S.C. § 332(c)(7)(B)(v).

[4]FCC guidelines for electromagnetic radiation exposure are set forth in a publication entitled OET Bulletin No. 65 (Ed. 97-01), which is available on the FCC's web site at www.fcc.gov/oet/rfsafety.

> subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[5]

Section 1983 is a far reaching statute. It reaches any right, privilege or immunity secured by the Constitution or by federal law. *See Dennis v. Higgins*, 522 U.S. 118 (1997) (coverage of § 1983 must be broadly construed).

Section 1988(b), in turn, provides that the prevailing party, other than the United States, in an action prosecuted under, inter alia, § 1983 may be awarded reasonable attorneys' fees. There is no allegation that respondent, Mr. Abrams was not a prevailing party against Petitioners or that he would otherwise not qualify for attorneys' fees if §§ 1983 and 1988(b) otherwise apply in this case.

Although the statute on its face provides that an award for attorneys' fees is discretionary, it was the plain intent of Congress in passing § 1988(b) that fees be awarded as a matter of course absent circumstances that would make the award unjust. Section 1988(b) was adopted in 1976 in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The provision was intended to close "anomalous gaps in our civil rights laws whereby awards of fees are . . . unavailable." S. Rep. No. 94-1011, at 4 (1976). The Senate Report explained:

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[5]42 U.S.C. § 1983.

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. . . . 'Without counsel fees the grant of Federal jurisdiction is but an empty gesture.' *Hall v. Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972).

Id., at 2-3. *See also Zarcone v. Perry*, 581 F. 2d 1039, 1041 (2d Cir. 1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). Thus, awarding fees should be the rule, rather than the exception, with the special circumstances exception applied only in unusual cases. *Ackerley Communications, Inc. v. City of Salem, Oregon*, 752 F. 2d 1394, 1396 (9th Cir. 1985), *cert. denied*, 472 U.S. 1028 (1985).

SUMMARY OF ARGUMENT

This Court's prior decisions hold that an individuals whose rights under a federal statute have been violated may obtain damages against a municipality under § 1983 unless Congress intended to preclude a § 1983 remedy. In the absence of an express preclusion of a § 1983 remedy, this Court will examine the statute to determine whether a Congressional intent to deny § 1983 relief is manifest. Such an intent to preclude a § 1983 remedy will be inferred where a § 1983 remedy is inconsistent with the statutory scheme Congress has crafted, or where the scheme Congress has crafted is so comprehensive as to lead to the conclusion that Congress

intended the remedial statute to be the sole and exclusive remedy to vindicate the denial of federal Constitutional or statutory rights.

As the Act at issue here does not contain any wording which expressly precludes a § 1983 action, petitioners have the specific burden to demonstrate that Congress nevertheless intended to preclude a § 1983 action by establishing that § 332(c)(7)(B) is either inconsistent with a § 1983 remedy or that the statute itself provides for such a comprehensive remedial scheme that it supplants all other remedies, including those under § 1983. The statute is not inconsistent with § 1983 relief. Moreover, although the statute specifies certain procedural requirements, and requires expedited proceedings, § 332(c)(7)(B) does not provide for any remedial scheme at all, comprehensive or otherwise. In the absence of clear explicit or implicit Congressional intent to deny a § 1983 remedy, this Court should avoid any temptation to limit § 1983's reach.

Moreover, allowing an aggrieved party under §332(c)(7)(B)(v) access to § 1983 remedies would further the Congressional intent in enacting the provision. It would encourage local government officials to treat all applicants for siting personal wireless service facilities fairly and in compliance with the Act. This would be consistent with the Act's purpose, to secure lower prices and higher quality services for American telecommunications consumers.

ARGUMENT

Section 1983 states the general rule that persons acting under color of state law who deprive others of any rights under the Constitution or federal law "shall be liable to the party injured." 42 U.S.C. § 1983. The courts have interpreted this statute to allow several types of relief, including damages and

equitable remedies such as injunctions. *See, e.g., Donahue v. Staunton*, 471 F.2d 475, *cert. denied* 410 U.S. 955 (1972). Moreover, § 1988(b) allows the court, to award reasonable attorneys' fees to the prevailing party in a § 1983 action.

Section 1983 applies to deprivations of both Constitutional rights and rights guaranteed under federal law. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Petitioners do not dispute that § 332(c)(7)(B) creates enforceable federal rights. Rather, they suggest that the only source of a remedy available to Mr. Abrams is that available pursuant to § 332(c)(7)(B)(v). That provision, however, merely amounts to a grant of judicial jurisdiction. That provision allows "[a]ny person adversely affected by any final action or failure to act by a State or local government" to file an action with any court of competent jurisdiction and to have the case decided on an expedited basis. 47 U.S.C. §332(c)(7)(B)(v).

This Court's decisions have made it plain that rights granting statutes may be enforced by a § 1983 action unless it is Congress's intent to withhold a § 1983 remedy. As Justice O'Connor's opinion for the Court in *Blessing v. Freestone,* 520 U.S. 329 (1997), explained, petitioners have a "difficult showing" to make that allowing a § 1983 action to go forward "'would be inconsistent with Congress's carefully tailored scheme.'" *Id.* at 346 (quoting *Golden State Transit Corp. v. Los Angeles,* 493 U.S.103, 107 (1989)). In this case, Petitioners have not made that showing.

Petitioners and amici on their behalf seek to make this difficult showing by suggesting that § 1983 relief would be inconsistent with § 332(c)(7), and that § 332(c)(7) is itself a comprehensive remedial statute sufficient to show Congressional intent to exclude a § 1983 remedy. There is nothing, however, in the wording of § 332(c)(7) which is

inconsistent with § 1983. Section 332(c)(7)(B)(v)'s 30-day limitations provision is not inconsistent with § 1983 because § 1983 has no specific limitations period applicable to it. Likewise, the requirement that courts expedite proceedings alleging a violation of the rights granted by § 332(c)(7)(B) is in no way inconsistent with § 1983. And there is no inherent inconsistency between § 332(c)(7)(B) and an award of attorneys' fees under § 1988(b) to a party prevailing against a local governmental instrumentality in an action to enforce rights granted by § 332(c)(7)(B).

Section 332(c)(7)(B) is also not such a comprehensive remedial provision sufficient to give rise to the inference that Congress intended to exclude all other federal remedies. This Court has made such a conclusion in only two cases where Congress carefully spelled out in detail the available remedies it considered necessary to vindicate rights under the statutes in question. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984). Here, Congress ensured only that victims of unlawful state and local governmental tower siting decisions would enjoy an expedited judicial proceeding to vindicate their rights. Congress did not identify any specific judicial remedy, however, unlike the two statutes this Court previously has found to have qualified as comprehensive remedial statutes.

A. 42 U.S.C. § 1983 relief is not inconsistent with § 332(c)(7)(B)

Petitioners' argument that § 1983 relief is inconsistent with § 332(c)(7)(B) is unconvincing. Petitioners argue this inconsistency is apparent because § 332(c)(7)(B)(v) contains a 30 day limitation provision, while one normally has four years to bring a claim under § 1983. Petitioners' Brief at 28. That is

simply not an inconsistency. First, as the United States admits (U.S. Brief at note 4), § 1983 contains no limitation period. *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Thus, § 1983 can hardly be considered inconsistent with § 332(c)(7)(B) on this basis. The United States, however, maintains that the two acts are inconsistent because state statutes of limitations govern § 1983 actions. U.S. Brief at 23-25 & n. 4, citing *Wilson v. Garcia,* 471 U.S. at 267. The United States misreads *Wilson.* This Court actually said in *Wilson,* "Where Congress has not established a specific limitation for a cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law." *Id.* at 266-67. Here the rights granting statute at issue, § 332(c)(7)(B)(v) contains its own 30-day limitations period. That is perfectly consistent with the statutory scheme of § 1983. In drafting § 1988(a) to govern the litigation of civil rights cases, Congress directed that "'First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.'" *Wilson v. Garcia*, 471 U.S. at 267 (quoting 42 U.S.C. § 1988(a)). To suggest that the inclusion in a rights granting statute of a separate limitations period evidences a Congressional intent to deny § 1983 remedies runs directly contrary to § 1988(a)'s wording and would suggest that § 1983 jurisdiction should be denied merely because in granting a statutory right, Congress coupled it with a specific limitations period to assert that right. That does not logically follow.

Similarly, the suggestion that Section 332(c)(7)(B) is inconsistent with § 1983's (through § 1988(b)'s) attorneys' fees provision is unavailing There is nothing inconsistent with the Act's title, "preservation of local zoning authority," and the award of attorneys' fees for violation of the federal rights

granted by the Act.[6] Nothing is inconsistent between preserving local authority, except where inconsistent with the Act, and providing for attorneys' fees where local government officials violate the Act. The argument of Petitioners and the amici in support is circular: Congress could not have intended to allow the award of damages under § 1983 and attorneys' fees under § 1988(b) because then state and local officials violating § 332(c)(7)(B) would have to pay attorneys' fees.[7] *See* Petitioners Brief at 29-30; U.S. Brief at 22-23. Congress adopted § 1988(b) to provide as a general rule for attorneys' fees awards in cases where state and local governmental officials deny rights guaranteed by federal statute. So it is hardly inconsistent to apply that provision to a rights granting statute such as § 332(c)(7)(B).

In a related argument, Petitioners and amici seem to suggest an unfairness in subjecting local governmental officials to attorneys' fees awards (and presumably damages) due to the nature of the zoning decisions at issue. They suggest local officials should not be subject to such awards for mere

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[6]Likewise, the argument of the United States that it is the "general rule that litigants pay their own attorneys' fees, " Brief at 22-23 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994)), is unavailing. *Fogarty* made clear that the attorneys' fee provision available in suits for copyright infringement, 17 U.S.C. § 505, is truly discretionary. By contrast, the legislative history of § 1988(b) makes it clear that attorneys' fees should be awarded to successful litigants absent unusual circumstances. *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983); *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1300-1301 (1st Cir. 1997).

[7]Concern over the award of attorneys' fees appears to be the principal reason for the Seventh Circuit's decision in *Primeco Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1141, 1153 (2003), decided contrary to the Ninth Circuit's decision below. Interestingly, the Seventh Circuit appears not to be troubled by the possibility of a damage remedy for violation of § 332(c)(7)(B). *See id. at 1152-53,* citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-76 (1992).

mistaken judgments in a complex area, that local governments will be cowered in fulfilling their zoning responsibilities, and that huge telecommunications giants will be the beneficiaries of such awards. *See* Petitioners Brief at 29-32; Brief of National League of Cities, et al. at 21-23. The standards local officials must meet to avoid liability, however, are rather lax. They must make a timely decision. They must not unreasonably discriminate. Their decisions must not have the effect of prohibiting personal wireless services. They must make their decisions in writing. And their decisions must have substantial evidentiary support. These modest requirements would hardly serve to intimidate local officials acting in good faith. As to the suggestion that applying § 1983 would have the effect of enriching huge telecommunications concerns at the expense of local governmental services, this case aptly illustrates the more typical situation where it is the small entrepreneur who tends to be ground down by the huge expense of vindicating rights under the statute in question. To the extent a small municipality in good faith is found to have inadvertently violated § 332(c)(7)(B), and would be financially endangered by an attorneys' fee award to a large, well heeled telecommunications enterprise, we have no doubt that situation would suffice as a special circumstance justifying the denial of attorneys' fees under § 1988(b). Suffice it to say, that is not the situation in this case.

Even less convincing is Petitioners' argument that allowing actions seeking § 1983 remedies to enforce rights granted under § 332(c)(7)(B) would be inconsistent with § 332(c)(7)(B) because that statute contains a clause requiring courts to expedite actions to redress violations of the statute. Petitioners' suggestion that the requirement for expedition would be nullified by seeking a § 1983 remedy simply does not follow. Plainly, the meaning of the expedition clause is that actions based on a violation of rights granted under the statute

are to be expedited, including claims for relief under § 1983. There is simply no inconsistency in reading the two statutes that way. Such a reading complies with the basic canon of statutory construction that statutes are to be read in harmony, if practicable. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Plainly then no inconsistency exists between the provisions of §332(c)(7) and §§ 1983 and 1988(b).

B. 47 U.S.C. § 332(c)(7) is not such a comprehensive remedial statute as to show Congress's intent to exclude a § 1983 remedy for its violation

Even where § 1983 relief is not inconsistent with a rights granting statute, Congress may implicitly preclude a § 1983 action by creating a comprehensive enforcement scheme that gives such a full and complete remedy as to demonstrate that Congress nevertheless intended to preclude § 1983 remedies.

This Court has found such comprehensive enforcement schemes in only two cases, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (hereinafter "*Sea Clammers*"), involving the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), and *Smith v. Robinson*, 468 U.S. 992 (1984), involving the Education for All Handicapped Children Act ("EHA"), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq*.

In *Sea Clammers*, the Court described the enforcement provisions of the FWPCA and MPRSA as "unusually

elaborate." 453 U.S. at 13. Those acts conferred on both government officials and private citizens the right to sue for enforcement. The FWPCA authorized the

> EPA Administrator to respond to violations of the Act with compliance orders and civil suits. . . . He may seek a civil penalty of up to $10,000 per day . . . and criminal penalties are available. . . . States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. . . . In addition, under § 509(b), 33 U.S.C. § 1369(b), 'any interested person' may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement.

Sea Clammers, 453 U.S. at 14-15 (citations omitted).

The Court continued that the foregoing enforcement mechanisms, which for the most part had their counterparts in the MPRSA, "are supplemented by the express citizen-suit provisions" in both acts, which "authorize private persons to sue for injunctions to enforce these statutes," subject to plaintiffs complying with certain specific procedures, including giving prior notice to potential defendants. *Id.* at 14.

In light of these elaborate enforcement mechanisms, the Court could not assume "that Congress intended to authorize by

implication additional judicial remedies for private citizens suing under [those Acts]." *Id.*

In *Smith v. Robinson*, 468 U.S. 992, the Court held that Congress intended a claim that a child was being discriminated against on the basis of his handicapped condition, in violation of the Equal Protection Clause of the Fourteenth Amendment, to be asserted only pursuant EHA. The Court thus held that relief based on § 1983, including attorneys' fees under § 1988(b), was not available on that constitutional claim. In so holding, the Court was required to discuss "the elaborate substantive and procedural requirements of the EHA." *Id.* at 1006.

The Court explained that the EHA was a comprehensive scheme set up by Congress to aid the States in complying with their "constitutional obligations to provide public education for handicapped children." *Id.* at 1009. Both the statutory provisions and its legislative history:

> indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanisms set out in the statute.

Id. The Court emphasized that the EHA "was an attempt to relieve the burden placed on States and localities by their responsibility to provide education for all handicapped children." *Id.* at 1010 (citing 20 U.S.C. §§ 1400(b)(8) and (9)). The Court further explained that the Act established "an elaborate procedural mechanism to protect the rights of handicapped children." *Id.* These procedures required fair and adequate hearings conducted by the State. *Id.* Moreover, it

was the intent of Congress "that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415." *Smith v. Robinson*, 368 U.S. at 1011.

In fact a review of 20 U.S.C. § 1415 (Procedural safeguards), shows plainly what this Court meant by a carefully tailored administrative and judicial scheme.

Section 1415(b)(1) and (2) requires states to adopt procedures to allow parents or an appointed independent surrogate to inspect all records relating to the child and to participate in meetings with respect to the identification, evaluation and educational placement of the child, and the provision of a free appropriate public education to such child (hereinafter collectively "Educational Plan"), and to obtain an independent educational evaluation of the child. Section 1415(b)(3) requires the parents to receive written notice whenever the agency proposes or refuses to initiate a change in the child's Educational Plan. That notice must meet the detailed requirements of § 1415(c)(1)-(7). Section 1415(b)(5) requires that the state have in place procedures for mediation in accordance with § 1415(e), where the requirements for mediation are in turn detailed. Section 1415(b)(6) requires that the state have in place procedures for the presentation of complaints with respect to the child's Educational Plan. Section 1415(b)(7) sets forth detailed notice provisions with respect to such complaints filed on behalf of the child. Section 1415(b)(8) requires states to develop a model form of complaint for use of parents or surrogates.

The statute further provides for an impartial due process hearing on complaints, with mandatory advance disclosure of

evaluations and recommendations parties intend to use, with the proviso that such hearings may not be conducted by an employee of the state educational agency or the local educational agency involved in the education or care of the child. § 1415 (f). Section 1415(g), in turn, provides for appeals from local hearings to the state educational agency. Moreover, § 1415(h) provides for a variety of safeguards at such hearings, including the right to counsel and consultation with experts, the right to present evidence, compulsory process for witnesses, the right to confront and cross examine adverse witnesses, the right to a transcript of proceedings, the right to a written or electronic findings of fact and decision. Section 1415(i)(2) provides for the right of an aggrieved party to bring a civil action in a state or federal district court without regard of the amount in controversy, and empowers the court to "grant such relief as the court determines is appropriate." Moreover, that provision specifies that the court's decision shall be based on the preponderance of the evidence standard. In addition, § 1415(i)(3) provides detailed provisions with respect to the award of attorneys' fees. Other provisions in § 1415 govern maintenance of current educational placement during pendency of proceedings, the authority to place a child in an alternative educational setting, the authority of a hearing officer to order a change in the placement of a child with a disability to an interim alternative educational setting, the handling of disciplinary actions where behavior may result from a manifestation of the disability, including the right of the parents to appeal, and placement during appeals. *See* § 1415((j)-(k)(1)-(7).

Given the breadth and depth of the EHA, it is easy to understand the Court's holding in *Smith v. Robinson* that the statute was a comprehensive scheme to enforce the right of a disabled child to a free public education, sufficient to rebut the presumption that § 1983 remedies would also be available. The

Congressional scheme contemplated several layers of administrative proceedings. These administrative proceedings were essential to effecting Congress's goal to ensure an equal free public education for disabled children. The administrative proceedings applied to virtually all aspects of the child's Educational Plan. Congress further mandated detailed due process protections for these proceedings, including appeals therefrom. Congress not only specified that aggrieved parties had a cause of action in federal and state court, but specified the burden of proof. Most importantly, the EHA specifically empowered the court to grant all appropriate relief, and the Act specifically and in detail set out when attorneys' fees would be available against the state or local authorities. As the Court explained in *Blessing v. Freestone*, "We reasoned that Congress could not possibly have wanted parents to skip these procedures and go straight to court by way of § 1983, since that would have 'rendered superfluous most of the detailed procedural protections outlined in the statute,'" 520 U.S. at 347 (quoting in part from *Smith v. Robinson*, 468 U.S. at 1011).

By contrast, § 332(c)(7) is not in any way the type of comprehensive and remedial regimes at issue in *Sea Clammers* and *Smith v. Robinson.*[8] Section 332(c)(7), unlike the other statutes, specifies no specific remedies. It merely provides that there will be a judicial forum available to redress violations of

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[8]Citing various provisions for the regulation of common carriers, Petitioners suggest that the Court consider the Communications Act, 47 U.S.C. § 101 *et seq.* as a whole to be a comprehensive remedial regime. Petitioners' Brief at 24-25. The Court should decline to do so. The Communications Act is certainly a comprehensive scheme for the regulation of the communications industry. It is certainly not a comprehensive scheme for the regulation of state and local zoning decisions, and the existence of various unrelated regulatory provisions applicable to the telecommunications industry cannot under any logical reasoning transform § 332(c)(7)(B) into a comprehensive remedial provision.

the Act. Contrary to indicating that Congress desired to exclude a § 1983 remedy, the specific inclusion of the cause of action provision in § 332(c)(7)(B)(v) serves merely to remove any doubt that § 332(c)(7)(B) is in fact a rights granting statute. Previous decisions of this Court have labored over that very issue of whether a cause of action should be implied under § 1983. *See, e.g., Gonzaga University v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone,* 520 U.S. 329; *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987)(O'Connor, J., dissenting). Here Congress made that job easy for the courts by specifically authorizing a cause of action.

As the Ninth Circuit held below, § 332(c)(7)(B) provides no remedy. This is in plain contrast to the statute in *Sea Clammers* that provided for injunctive relief, and the statute in *Smith v. Robinson* that provided for "appropriate relief" and attorneys' fees. Section 1983, however, has been specifically denominated as a remedies statute. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (quoting Senator Edmunds: "It only gives a remedy"). *See also Albright v. Oliver*, 510 U.S. 267, 271 (1994) (section 1983 merely provides a method for vindicating federal rights elsewhere conferred).

Nevertheless, the United States suggests that in the absence of an express grant of remedies, § 332(c)(7)(B) should be read to include at least an implied remedy of injunctive relief. U.S. Brief at 16. Suffice it to say that argument hardly should persuade this Court that § 332(c)(7) qualifies as a comprehensive remedial statute. Moreover, an injunction is not a remedy at all. It does not redress an injury. It merely stops further damage. *See Cruz v. American Airlines, Inc.*, 356 F.3d 320, 328 (D.C. Cir. 2004) (injunction will not redress concrete injury plaintiffs have already suffered). *Mitchell v. United States,* 219 Ct. Cl. 95, 591 F.2d 1300, 1302 (1979), *reversed*

on other grounds and remanded, 445 U.S. 535 (1980), *on remand*, 229 Ct. Cl. 1, 664 F.2d 265 (1981) (en banc), *affirmed and remanded*,463 U.S. 206 (1983) (injunction would be meaningless for damage already done). A full and comprehensive remedy would include a damage remedy, which § 1983 provides. Given the existence of § 1983, a generally applicable statute providing remedies for violation of federally granted rights, it would appear reaching to conclude that it is necessary to infer such remedies to avoid application of § 1983.

Section 332(c)(7)(B)(v) provides only that an aggrieved wireless provider has the right to file an action, subject to certain procedural limitations and requirements. No provision is made for any specific remedy or enforcement option, or for any administrative review, detailed or otherwise. Thus, the circumstances which existed in *Sea Clammers* and *Smith v. Robinson* simply do not exist in this case to lead to the conclusion that Congress intended to close the door on § 1983.

A Congressional intent to preclude a § 1983 remedy cannot be found in the legislative history of § 332(c)(7)(B)(v). The Conference Report made it clear that § 332(c)(7)(B)(v) was enacted to provide a "mechanism for judicial relief from zoning decisions that fail to comply with the provisions" of § 332(c)(7)(B)(i)-(iii). H.R. Rep. No. 104-458, 104th Congress, 2d Sess. 208 (1996). It was the intent of the conferees to provide the courts with "exclusive jurisdiction" over all disputes arising under § 332(c)(7)(B) (except § 332(c)(7)(B)(iv)). *Id.* Rather than providing a comprehensive remedial scheme, the conferees gave an injured party the option of bringing an action either in the "Federal district court in which the facilities are located or a State court of competent jurisdiction" without "waiting for the exhaustion of an independent State court remedy otherwise required." *Id.* at

209. The conferees did not specify either the type of action that could be brought or the type of remedy that could be provided.

CONCLUSION.

For the reasons discussed above, this Court should hold that Congress did not intend to exclude § 1983 remedies in a proceeding for enforcement of § 332(c)(7)(B) of the Communications Act. Accordingly this Court should affirm the Ninth Circuit's decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION ("CTIA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Omnipoint Communications, Inc. v. City of White Plains,
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Omnipoint Communications, Inc. v. Village of Tarrytown,
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Omnipoint Communications MB Operations, LLC v. Town of Lincoln,
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Cited Authorities

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47 U.S.C. § 332(c)(7)	*passim*

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H.R. Rep. No. 104-204 (1995)	6, 24, 26
H.R. Rep. No. 104-458 (1996)	7, 26

Cited Authorities

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Administrative Materials:

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Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting For Commercial Mobile Services Providers, Petition for Rulemaking, RM 8577 (FCC Dec. 22, 1994) 6

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Comments of United States Cellular Corp., RM-8577 (FCC Feb. 17, 1995) 6

Revision of Commission's Rules To Ensure Compatibility with E-911 Emergency Calling Systems, 11 F.C.C.R. 18676 (1996) 4

U.S. West Petition for Expedited Partial Reconsideration and for Clarification, GEN Docket No. 90-314 (FCC Dec. 8, 1993) 4

Cited Authorities

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Miscellaneous:

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Peter M. Degnan, et al., *The Telecommunications Act of 1996: § 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Siting Context*, 3 MICHIGAN TELECOMMUNICATIONS TECHNOLOGY LAW REVIEW 1 (1997) 5

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Leonard Kennedy & Heather Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FEDERAL COMMUNICATION LAW JOURNAL 547 (1997-1998) 3, 23

Gregory M. Kratofil, Jr., *The Telecommunications Act of 1996 and Section 704: A "Boom" or "Bust" for the Mobile Telephony Industry*, 16 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 499 (1997) 2, 25

WILLIAM C.Y. LEE, MOBILE COMMUNICATIONS ENGINEERING (1982) 2

Kevin M. O'Neill, Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call without Violating Section 704 of the Telecommunications Act of 1996?, 40 WILLIAM & MARY LAW REVIEW 975 (1999) 2, 7

Cited Authorities

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Reinventing Competition: The Wireless Paradigm and the Information Age, CTIA Monograph Series 13 (Feb. 1995)	4
Brief of the United States, *Gonzaga Univ. v. Doe*, No. 01-679 (filed Feb. 22, 2002)	14

STATEMENT OF INTEREST[1]

The Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA frequently participates in Federal Communication Commission ("FCC") proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA has been involved in tower siting issues for decades. It participated in the FCC's 1994 proceeding examining the ways in which local zoning board decisions had stymied the deployment of wireless infrastructure. That proceeding led directly to the passage of the statutory provision at issue in this case, 47 U.S.C. § 332(c)(7). CTIA was also actively involved in the legislative process that led to enactment of § 332(c)(7). CTIA has presented its views in testimony before Congress, and has filed numerous *amicus* briefs in the federal courts on behalf of the wireless industry.[2]

Given its direct participation in the processes that led to the enactment of § 332(c)(7) and its membership, CTIA is in a unique position to inform the Court as to the history and purpose of § 332(c)(7) and why § 1983 remedies are critical to effective vindication of the rights created by § 332(c)(7).

STATEMENT

1. Modern "cellular" telephony[3] works by dividing a large geographic region into smaller "cells," each of which is served

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, CTIA states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than CTIA, its members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] CTIA has filed *amicus* briefs in, *inter alia*, *Cincinnati SMSA L.P. v. Pub. Utils. Comm'n of Ohio*, No. 02-1711 (U.S.); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *AT&T Wireless Servs. v. Tenore*, No. 98-947 (U.S.); and *Cellco Partnership v. Hatch*, No. 04-3198 (8th Cir.).

[3] A "cellular phone" is a device using any one of a number of discrete radio services, separately licensed by the FCC, including cellular (the original technology), Personal Communications Service ("PCS") (a competitive technology licensed in 1994), and certain types of Specialized Mobile Radio ("SMR") (a cellularized service model).

by a base station sited on a tower or other structure, such as a water tower or a building. When a user makes a call, the handset automatically communicates with the base station that provides the strongest transmission. As the user moves through a service area, the network hands the call from one base station to another. By using relatively low-power, short-range handsets to communicate with a network of relatively low-power base stations, cellular technology minimizes the interference between customers in different parts of a service area, and allows a slice of radio spectrum to serve a far higher number of people in a given region.

The nature of cellular technology means that, to ensure reliable communications, a wireless operator must construct a network of two-way radio antennae throughout its service area. The number of antennae needed depends on many factors, including the radio frequency used, the transmission technology employed, the surrounding terrain, and the number of subscribers. Generally, the larger the number of subscribers, the more cells and thus the more antennae are required to provide service. *See* WILLIAM C.Y. LEE, MOBILE COMMUNICATIONS ENGINEERING 9 (1982).

The need to site and place antennae and the towers to which they are attached has led to conflicts between the wireless industry and local zoning authorities. Wireless carriers often had to seek "variance[s]" or "conditional use permit[s]" from local zoning boards, which historically had neither clear rules nor zoning classifications for wireless facilities. Kevin M. O'Neill, *Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975, 986-87 n.62 (1999) (*"Towering Problem"*). "In some cases, a small community simply denies the permit, and cellular providers are forced to delay operations as they appeal or rework an entire plan at huge costs to the provider." Gregory M. Kratofil, Jr., *The Telecommunications Act of 1996 and Section 704: A "Boom" or "Bust" for the Mobile Telephony Industry*, 16 ST. LOUIS PUB. L. REV. 499, 505 (1997) (*"Boom or Bust"*).

2. The FCC granted the first cellular communications license in 1983. State and local regulatory burdens, zoning laws,

and policies directed at protecting incumbent wireline telephone companies contributed to the sluggish pace of cellular expansion in the early 1980's. Leonard Kennedy and Heather Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COMM. L. J. 547, 559 (1997-1998) (*"Hog Tight"*). Rapid growth of cellular telephony began in the late 1980's with the introduction of smaller and less expensive handsets and the advent of more attractive price plans. As of December 1991, there were approximately 7.5 million cellular subscribers nationwide. *CTIA Industry Mid-Year Data Survey* (June 30, 1994). By 1994, that figure had grown to more than 19 million; despite this rapid growth, only seven percent of the U.S. population had cell phone service. *Id.*

In 1993, Congress amended the Communications Act to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993). These sweeping changes prohibited "any" state or local regulation of the "the entry of or the rates charged by any" wireless carrier, 47 U.S.C. § 332(c)(3)(A), and excluded wireless telecommunications from the traditional system of state regulation of intrastate telecommunications services and FCC regulation of interstate telecommunications services, *Id.* § 152(b); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-74 (1986).

Congress failed, however, to extend the preemptive force of § 332 itself to state and local zoning decisions. The legislative history of the 1993 amendments makes clear that "facilities siting issues (e.g., zoning)" were considered to be within the "other terms and conditions" that were not subject to express statutory preemption under § 332. H.R. Rep. No. 103-111, at 261.

3. Rapid changes in the industry, spurred by the federal government's desire to encourage competitive wireless service, soon followed. Three developments dramatically increased demand for new cell sites: (1) Cellular subscription continued to grow rapidly, requiring the doubling of cell sites over a ten-

year period, *Reinventing Competition: The Wireless Paradigm and the Information Age*, CTIA Monograph, at 13 (Feb. 1995) ("*Reinventing Competition*"); (2) major SMR carriers moved to a cellularized model and began offering connections to the public telephone network in addition to their traditional mobile-to-base (or "dispatch") radio function; and (3) the FCC licensed PCS systems in 1994, which compete with cellular services, *Amendment of the Commission's Rules to Establish New PCS*, 8 F.C.C.R. 7700, 7710 (1993).[4]

The FCC imposed "build out" requirements on wireless carriers as conditions of their licenses.[5] The "most important goal" was to create "a seamless and integrated nationwide cellular service, so that subscribers [could] receive high quality cellular service throughout the nation." *Amendment of Part 22 of the Commission's Rules*, 6 F.C.C.R. 6185, 6187 (1991). The FCC also recognized the vital role that wireless communications play in emergencies, and since 1994 has worked with carriers to implement Enhanced 911 standards for wireless telephony nationwide. *Revision of Commission's Rules To Ensure Compatibility with E-911 Emergency Calling Systems*, 11 F.C.C.R. 18676 (1996).

While the need for new wireless infrastructure grew dramatically, wireless carriers seeking zoning approval for network construction increasingly confronted so-called "NIMBY" groups. As one commentator explained:

> NIMBY is an acronym that stands for "Not-In-My-Backyard." It refers to the phenomenon of local citizens who desire the benefit of essential infrastructure (*e.g.*, nursing homes and wireless telecommunications facilities), but want them

[4] Due to the physics of PCS systems, PCS providers require between four and seven cell sites to provide coverage identical to one cellular radio cell site. *U.S. West Petition for Expedited Partial Reconsideration and for Clarification*, GEN Dkt. No. 90-314, at 7-12 (Dec. 8, 1993). In 1994, CTIA estimated that the rollout of PCS necessitated as many as 100,000 additional cell sites. *Reinventing Competition*, at 13.

[5] The FCC mandated that licensees construct sufficient tower sites to provide coverage for their service area within a specified number of years. *See* 47 C.F.R. §§ 22.947, 22.949 (cellular), 24.203(a) (PCS), 90.685(b) (SMR).

> placed in locations other than their own neighborhoods or communities.

David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb To Prevent the Siting of Wireless Towers*, 23 J. CORP. LAW 469, 482-83 (1998) (footnotes omitted) ("*When NIMBYs Attack*").

The efforts of NIMBY activists in thousands of localities across the fifty states caused confusion, delay, and discrimination among wireless providers. Often, zoning boards would accede to residents' opposition by delaying or rejecting variance requests, resulting in litigation.[6] Carriers were whipsawed between federal "build out" and service obligations that were conditions of their FCC licenses and local requirements that prevented them from building out their networks.[7]

4. To address the related problems of NIMBY-ism, zoning board indifference or hostility, and irrational and unscientific claims regarding health effects of radio frequency emissions, the wireless industry, through the CTIA, petitioned the FCC

[6] *See, e.g., BellSouth Mobility Inc. v. Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996) (five minute testimony from a single resident found sufficient by zoning board to justify denial of tower permit, despite BellSouth's presentation of an Airspace Safety Analysis, a memorandum from County Departments of Transportation and Public Safety indicating no objection, an independent appraisal of property values, and a willingness to reduce the proposed pole height by 20 feet); *NYNEX Mobile Communications Co. v. Hazlet Township Zoning Bd.*, 648 A.2d. 724, 726-728 (N.J. Sup. Ct. App. Div. 1994) (zoning board denied use permit to locate antenna on existing tower based solely on generalized concerns of board and audience at hearing, where NYNEX produced testimony from town's former planner and drafter of town plan and zoning ordinance that permit was consistent with the town's plan, as well as supporting engineering testimony regarding health and safety issues).

[7] "[I]n many localities, tower construction is bogged down in a quagmire of community complaints and politically motivated governmental reviews. Thus, cellular providers are saddled with increasing demands of customers and federal licenses that *require the cellular company to provide adequate service* in the face of increasing opposition to telecommunications siting." Peter M. Degnan, et al., *The Telecommunications Act of 1996: § 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Siting Context*, 3 MICH. TELECOMM. TECH. L. REV. 1, 2 (1997) (emphasis added), *available at* http://www.mttlr.org/volthree/mclaren.pdf (visited Dec. 17, 2004).

to preempt state and local tower siting regulations and replace them with a federal regime. *See Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting For Commercial Mobile Services Providers*, Petition for Rulemaking, RM 8577 (FCC Dec. 22, 1994).[8]

5. While CTIA's petition was pending, Congress began considering what would become the landmark Telecommunications Act of 1996 ("1996 Act"). In a committee report accompanying an early version of the 1996 Act, the House Commerce Committee found that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of PCS as well as the rebuilding of a digital technology-based cellular telecommunications network." H.R. Rep. 104-204, Pt. 1, at 94 (1995). Thus, it was "in the *national interest* that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established *as soon as possible*." *Id.* at 94 (emphases added).

Rather than completely divesting local authorities of any role in the zoning process and supplanting these entities with a federal administrative solution, Congress addressed the problem of zoning bottlenecks in a different fashion. Section 704 of the 1996 Act, codified as 47 U.S.C. § 332(c)(7), federalized much of the local zoning process requiring that all local zoning

[8] A few prominent examples from the record before the FCC include: (1) an Iowa zoning board that disregarded both a state legislative determination that cellular licensees were public utilities and an FAA determination that a particular cell tower posed no hazard to aviation, Comments of United States Cellular Corp., RM-8577, at 4 (Feb. 17, 1995); (2) the denial of a zoning permit based on the claim of a single resident that radiation from a cell tower killed one of her pet dogs, Comments of McCaw Cellular Communications, Inc., RM-8577, at 14 (Feb. 17, 1995); and (3) the denial of a permit to place a cell tower at a local sewage treatment plant because of putative concerns about health, migratory birds, and neighborhood character, Comments of Frontier Cellular Holding, Inc., Petition for Rulemaking, RM-8577, at 8 (Feb. 17, 1995). Even where a variance or conditional use permit was granted, it could take years to work through the multiple public hearings, denials, and resubmissions before construction could begin. Comments of Sprint Corp., RM-8577, at 4 (Feb. 21, 1995).

decisions be supported by a federal standard of "substantial evidence," and creating federal rights and immunities designed to guarantee wireless carriers fair, rational, and competitively neutral treatment and to furnish incentives for state and local officials to resist the political allure of NIMBY-ism. H.R. Rep. 104-458, at 208 (1996).

Section 332(c)(7) imposes five key limits on local zoning authorities, intended to "speed the approval and construction of wireless facilities by limiting the means by which local zoning boards could oppose these facilities." *Towering Problem*, 40 WM. & MARY L. REV. at 976. *First*, the zoning authority may not "unreasonably discriminate" among providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I). *Second*, the authority may not issue a decision that "prohibit[s] or has the effect of prohibiting" wireless service. *Id.* § 332(c)(7)(B)(i)(II). *Third*, the authority must act on permit requests "within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). *Fourth*, the decision must be in writing and supported by substantial evidence contained in a written record. *Id.* § 332(c)(7)(B)(iii). *Fifth*, local and state governments may not regulate the placement of personal wireless service facilities on the basis of the environmental effects of electromagnetic radiation, so long as the facilities meet FCC standards. *Id.* § 332(c)(7)(B)(iv).

SUMMARY OF ARGUMENT

Section 332(c)(7) vests in wireless carriers a series of federal statutory rights designed to override traditional principles of local zoning law. Congress took this bold action to effectuate a broader federal policy goal—a goal that many local zoning authorities had systematically opposed and effectively frustrated. The statute expressly relies upon private enforcement in any court of competent jurisdiction to effectuate the national goal of creating a seamless wireless telecommunications infrastructure. Nothing in § 332(c)(7) bespeaks any intent by Congress to select or exclude any form of judicial relief.

Confronted with the reality that § 332(c)(7) does not contain a "comprehensive enforcement regime," let alone one that is "incompatible" with the remedial provisions of § 1983,

petitioners alternatively seek to import such a remedial scheme from federal common law or from the very state and local zoning principles that § 332(c)(7) was enacted to displace. This effort to call "spirits from the vasty deep" is fundamentally flawed. The focus must be on Congressional intent—as expressed *in the statutory scheme at issue*. Any other approach ignores the terms and function of § 1983 by improperly using implied judicial remedies to oust its express remedial provisions. It would also mean that any statutory right that satisfied the first prong of the test for enforcement under § 1983 would perforce fail the second and thus would never be enforceable under § 1983.

There is no incompatibility between § 332(c)(7) and § 1983. Section 332(c)(7) is the product of FCC and congressional frustration with many zoning authorities' conscious efforts to block deployment of wireless facilities. The award of damages and attorney's fees is appropriate where injunctive relief alone cannot vindicate federal rights and local zoning authorities engage in willful disregard of federal rights or administrative chicanery that frustrates their vindication. Because the Ninth Circuit faithfully applied this Court's precedents, and because the arguments of petitioners and supporting *amici* would effectively gut § 1983 as an enforcement mechanism for *all* federal statutory rights—not only those contained in § 332—the judgment of the court of appeals should be affirmed.

ARGUMENT

I. PETITIONERS CANNOT OVERCOME THE STRONG PRESUMPTION IN FAVOR OF THE AVAILABILITY OF § 1983 REMEDIES.

On its face, § 1983 creates no federal rights but supplies federal remedies against anyone who, under color of state law, deprives a person "of *any* rights, privileges, or immunities secured by the Constitution *and laws*." 42 U.S.C. § 1983 (emphases added). Nothing in § 1983 limits its reach only to certain types of federal rights, and this Court has recognized that § 1983 "means what it says" and extends to "laws" of the United States. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Thus, where a federal statutory right is clearly at stake—as petitioners

and the United States concede here, Pet. Br. 33; U.S. Br. 16—there is a heavy presumption that Congress intended § 1983 to provide federal remedies for the deprivation of *any* federal right, unless Congress "specifically foreclosed a remedy under § 1983," *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984).

Petitioners therefore have the burden to demonstrate that Congress, by providing a cause of action in § 332(c)(7), intended to "close the door on § 1983 liability." *Blessing v. Freestone*, 520 U.S. 329, 348 (1997); *see Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 424 (1987). Not even petitioners suggest that Congress expressly "forb[ade] recourse to § 1983 in the statute itself." *Blessing*, 520 U.S. at 341. Accordingly, petitioners must demonstrate that Congress "impliedly" foreclosed § 1983 liability "by creating a *comprehensive* enforcement scheme that is *incompatible* with individual enforcement under § 1983." *Id.* at 341 (emphases added). In the more than 20 years since *Maine v. Thiboutot*, this Court has found such an extraordinary implied ouster of § 1983 remedies only twice. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith*, 468 U.S. 992. This is not such an extraordinary case.

A. Petitioners' Attempt To Conjure Up a "Comprehensive Remedial Scheme" under this Court's Precedents Borders on the Frivolous.

Section 332(c)(7) grants a limited and identifiable class of beneficiaries a specific set of substantive and procedural rights. The substantive rights include a right to be free from state and local prohibitions on federally licensed commercial activity and immunity from anti-competitive discrimination by those governments. The procedural rights include the right to a written and timely decision. The statute contemplates the vindication of these federal rights through judicial enforcement—thus effectuating through private litigation the statutory goal of overcoming staunch local resistance to the rapid and efficient deployment of a seamless national wireless infrastructure. In this sense, § 332(c)(7) is no different from a host of federal statutes that create specific rights in private

parties, using private law suits to promote broader statutory goals.[9]

Section 332(c)(7)(B)(v) creates a private cause of action, authorizing "[a]ny person adversely affected" by any denial of the federal rights created by the statute to "commence an action in any court of competent jurisdiction." As petitioners themselves point out, Pet. Br. 2-3, 46, Congress specifically rejected a model of preemption through exclusive federal administrative proceedings in favor of creating specific rights enforceable in state or federal court. Section 332(c)(7) contains exactly the "sort of explicit 'right-or-duty creating language,'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002) (citation omitted), that is "presumptively enforceable by § 1983," *id.* at 284. Indeed, this was undisputed below, *see Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094, 1096 (9th Cir. 2004), and is undisputed by the parties here.

Because § 332(c)(7) unambiguously vests respondent and all providers of personal wireless services with judicially enforceable federal rights, petitioners must establish that this is one of those "exceptional cases," *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994), where they can "make the difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346 (citation omitted). They cannot make that "difficult showing" without doing violence to the well-established methods of ascertaining congressional intent or radically reworking more than 20 years of § 1983 jurisprudence.

The text and structure of § 332(c)(7) reveal no evidence of a congressional intent to "close the door" on § 1983 remedies. The only affirmative (or negative) remedial choice Congress made in § 332(c)(7) was the decision to create judicially enforceable rights that could support *some* form of judicial relief. Nothing in the text, structure, or legislative history of

[9] *See, e.g.*, 20 U.S.C. §§ 1681-1688 (Title IX of the Education Amendments of 1972); 42 U.S.C. § 1396a(a)(13)(A); 42 U.S.C. § 2000d (Title IV of the Civil Rights Act of 1964); 42 U.S.C. § 1971 (Voting Rights Act). Each of these statutes creates individual rights, enforceable in federal court, to further national policy goals.

§ 332(c)(7) hints that Congress preferred any *one* form of judicial relief over *another*, or that Congress viewed § 332(c)(7) as a "comprehensive enforcement scheme" incompatible with the statutory remedies for vindicating federal rights presumptively available under § 1983.

To the contrary, Section 601 of the Communications Act conclusively proves otherwise. Section 601(c)(1) provides courts with a specific rule of statutory construction when faced, as here, with the question whether Congress in the Communications Act meant "impliedly" to affect the continuing applicability of any federal statute.[10] Section 601 mandates that the provisions of the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act." 47 U.S.C. § 152 note, 110 Stat. 143. This statutory text—including the title, "[n]o implied effect"—makes clear that nothing in the Communications Act can overcome any other federal statute unless Congress says so explicitly. Congress has not expressly stated that § 1983 remedies are unavailable in a suit arising under § 332(c)(7); petitioners' only argument is that Congress impliedly ousted § 1983.

In light of the plain language of Section 601, as the Eleventh Circuit correctly understood, there is no reason even to examine the "comprehensiveness" of § 332(c)(7). *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1327 (2000), *vacated on other grounds*, 260 F.3d 1320 (2001). That inquiry is only an *indirect* means of ascertaining Congressional intent. *See Sea Clammers*, 453 U.S. at 20. Here, Congress has already *directly* and unambiguously expressed its intent with respect to any possible nullification by implication. The judicial review provisions of the Act "shall not be construed" to have any "implied effect" on § 1983.

Implicitly recognizing the lack of "rebuttal evidence" in the statute itself, petitioners' argument is consumed with drawing inferences from congressional *silence* and reaching

[10] Unlike the "savings clauses" at issue in *Sea Clammers*, Section 610 does not simply preserve substantive rights outside the Communications Act. *See* 433 U.S. at 20-21 n. 31. Rather, it supplies a rule of construction for assessing the interaction of the Communications Act with preexisting provisions of federal law, including § 1983.

outside of § 332(c)(7) for evidence that Congress meant to exclude § 1983 as an enforcement tool for this statute. Petitioners argue that because (a) § 332(c)(7) creates a federal cause of action, Pet Br. 4-5, 36; and (b) general principles of federal common law require federal courts to imply appropriate judicial relief where none is specified, Pet. Br. 37-39; these judicially implied remedies demonstrate that Congress intended to "shut the door" on all § 1983 remedies. *See also* U.S. Br. 16-17.

These endeavors are fundamentally flawed. Section 1983 is an express statutory authorization of certain remedies, intentionally crafted in general and capacious terms. The plain language of that provision provides that "[e]*very* person" who subjects "*any* citizen of the United States or person within the jurisdiction thereof to the deprivation of *any* rights" under federal law "*shall* be" liable for damages and attorneys fees. 42 U.S.C. § 1983 (emphases added). The notion that congressional silence, "federal common law," the inherent remedial powers of the federal courts, Pet. Br. 34-36; U.S. Br. 15-17, 20-22, or even the limits on state-court power to enforce state law, Pet. Br. 36-39, 41-45 & Apps. B & C, Nat'l League of Cities Br. 13-15, can constitute a "comprehensive enforcement scheme" sufficiently robust to overcome the plain language of § 1983 and the presumption in favor of its applicability is both unprecedented and unwise.

1. Section 332 breathes not a word about remedies. As petitioners concede, "[the statute] does not enumerate the available remedies." Pet. Br. 37; *see PrimeCo Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003). Simply put, congressional silence as to remedies does not "a comprehensive enforcement regime" make. *See, e.g., Sea Clammers*, 453 U.S. at 20 ("When *the remedial devices provided in a particular Act* are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." (emphasis added)); *id.* at 21 ("[T]he existence of these *express remedies* demonstrates ... that [Congress] intended to supplant any remedy that otherwise would be available under § 1983." (emphasis added)).

Nor can the failure to select or exclude any particular judicial remedies be deemed "incompatible" with application of a statute that is by design "a generally and presumptively available remedy for claimed violations of federal law." *Livadas*, 512 U.S. at 133. Section 332(c)(7) is no more or less compatible or incompatible with § 1983 remedies than it is with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the All Writs Act, 28 U.S.C. § 1651, or the Article III powers of the federal courts to remedy violations of federal law.

2. As both petitioners and the United States acknowledge, congressional intent is the touchstone of the rebuttal analysis under *Sea Clammers*. Pet. Br. 20; U.S. Br. 13. But heretofore the search for that intent has been limited to the text and legislative history of the federal enactment at issue; it has never been a free-floating inquiry into remedial possibilities outside the relevant statutory scheme. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521 (1981) ("[W]e have found private enforcement foreclosed *only when the statute itself creates a remedial scheme* that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" (emphasis added) (quoting *Sea Clammers*, 453 U.S. at 20)); *Smith*, 468 U.S. at 1011 (relying upon the "comprehensive nature of the procedures and guarantees set out in the EHA" in finding *Sea Clammers* test satisfied).

In contrast to the established approach of analyzing the statutory enforcement scheme immediately surrounding the federal right at issue, looking to general judicially implied remedies makes no sense as a means of ascertaining congressional intent. Such remedies are, after all, created by the judiciary and, by definition, constitute no evidence as to Congress's intent concerning any particular federal right. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring in the judgment). Section 1983's remedial provisions are as much (or more) a part of the background against which Congress legislates than any remedy implied by application of "federal common law."

Only three Terms ago, the United States expressly recognized these principles, noting that once Congress creates a specifically enforceable statutory right, it "need not go further

and warn in advance of 'the remedies available against a noncomplying State.' *Section 1983's text already makes that clear.*" U.S. Br. at 8-9, *Gonzaga Univ. v. Doe*, No. 01-679 (filed Feb. 22, 2002) (emphasis added) (citation omitted). Given the state of the law in 1996, the most logical inference to be drawn from Congress's creation of a specific federal right, without the selection or exclusion of any form of judicial relief, is that Congress intended to authorize a federal court to award the relief authorized by § 1983.

Likewise, it is difficult to see how the judicial power to imply remedies could operate to "repeal or replace," *Smith*, 468 U.S. at 1012, § 1983 remedies. Unlike a judicially implied right of action or remedy, "§ 1983 provides an 'alternative source of *express* congressional authorization of private suits.'" *Wilder*, 496 U.S. at 509 n.9 (citation omitted). The very separation-of-powers concerns that militate against broad judicial implication of private remedies, *see Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment), counsel against finding that judicially implied remedies supplant a generally applicable remedial statute. Indeed, if legislative repeals by implication are "not favored," *Morton v. Mancari*, 417 U.S. 535, 549 (1974), one would think that repeals by "judicial implication" are forbidden, *see Franklin*, 503 U.S. at 77-78 (Scalia, J., concurring in the judgment) (suggesting judicial power to limit implied remedies because they "should be limited by the same logic that gave them birth").[11]

Not surprisingly, given its tenuous roots, the "comprehensive enforcement scheme" that petitioners would erect from background principles of federal and state law is of uncertain dimension. By positing that a federal court's power under § 332(c)(7) is limited to injunctive relief,

[11] That Congress knows how specifically to limit the availability of certain remedies by express provision is clear from the Communications Act itself. Section 635A(a) of the Communications Act, entitled "Suits for damages prohibited," specifically limits the ability of cable operators to seek damages from local governments for violations of federal rights. 47 U.S.C. § 555a(a) ("limit[ing]" suits against local cable franchising authorities to "injunctive relief and declaratory relief").

Pet. Br. 37-39[12]—which would fail to make some plaintiffs whole, *see infra* Part II—petitioners break faith with the Seventh Circuit opinion upon which they otherwise so heavily rely. *See PrimeCo*, 352 F.3d 1152-53 (conferral of a private cause of action to enforce a federal statute "is presumed to entitle a successful plaintiff to the usual remedies, [citing *Franklin*], which include damages as well as injunctive relief"); *see also Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 695 & n.6 (3d Cir. 2002).

The United States is agnostic on this point, expressly avoiding "the question whether and under what circumstances other [non-injunctive] forms of relief are available." U.S. Br. 16 n.2. Petitioners too claim that this Court need not resolve the issue of availability of damages under § 332(c)(7) in order to find that statutory scheme sufficiently comprehensive to foreclose § 1983 remedies. Pet. Br. 38 n.12. The disagreement highlights the *ad hoc* nature of casting about for general principles of federal law and inherent judicial powers to conjure up a remedial regime to "repeal or replace" § 1983's statutory remedies.

3. Once petitioners' attempts to divorce the test for ouster of § 1983 remedies from the text, structure, and purpose of § 332(c)(7) are rejected, the argument that a "comprehensive enforcement scheme" exists in this statute is burlesque. The only two cases in which this Court has found a "comprehensive enforcement scheme" involved a panoply of administrative, public, and private enforcement mechanisms that this Court described as "unusually elaborate," *Sea Clammers*, 453 U.S. at 13, "carefully tailored," and "detailed," *Smith*, 468 U.S. at 1019, 1011.

[12] This is a quite a leap from *Franklin*, where the Court reiterated its prior rulings that "federal courts 'have the power to grant *all necessary remedial relief* for violations of [federal statutory rights]," 503 U.S. at 68 (emphasis added) (citation omitted), and "that the 'existence of a statutory right implies the existence of *all necessary and appropriate remedies*," *id.* at 68-69 (emphasis added) (citation omitted), and held that "a damages remedy is available for an action brought to enforce Title IX," *id.* at 76. Nowhere do petitioners explain how a party that suffers otherwise unrecoverable economic losses from a zoning board's violation of federal rights can be made whole with only injunctive relief. *See infra* Part II.

For example, in *Sea Clammers*, Congress made affirmative remedial choices that evinced a conscious design to include certain types of remedies and exclude others. These included administrative "compliance orders," civil actions by the EPA Administrator, federal civil and criminal penalties, state civil and criminal enforcement authority, and judicial review of actions by the EPA Administrator. 453 U.S. at 13-14. Both statutory schemes also contained "citizen suit provisions," which contained detailed requirements and exceptions to the private right of action and authorized only injunctive relief. 453 U.S. at 14.[13]

Similarly, in *Smith*, Congress made an affirmative choice to require, as a prerequisite to suit, an "elaborate procedural mechanism" that brought together all relevant parties in a mediation-type environment. 468 U.S. at 1011 (providing for state hearings before judicial review in "a process that begins on the local level and includes ongoing parental involvement [and] detailed procedural safeguards"). These carefully crafted "administrative remedies," designed to produce a non-adversarial process, constituted the comprehensive scheme inconsistent with the adversarial nature of federal litigation. *Id.* at 1101-02.

4. More fundamentally, petitioners and the United States rely upon the flawed premise that the availability of any form of judicial relief to vindicate a federal right ousts § 1983 remedies. Indeed, the United States goes so far as to urge this Court to erect a new rule—*any* statutory provision that creates a cause of action is per se comprehensive and therefore ousts § 1983 remedies as a matter of law. *See, e.g.*, U.S. Br. 15-17 & n.3

This accretion to the *Sea Clammers* rebuttal analysis has no foundation in the language of § 1983, the precedent of this Court, or logic. In fact, the strange regime advocated

[13] The "citizen-suit provisions" of each statute contained a detailed set of notice requirements and preclusion of suit where a governmental actor had initiated parallel civil or criminal proceedings. *Sea Clammers*, 453 U.S. at 6 n.9, *id.* at 7, n.11. The contrast with the unalloyed right to "commence an action in any court of competent jurisdiction," 47 U.S.C. § 332(c)(7)(B)(v), could not be more stark.

by the United States, and implicitly endorsed by petitioners, Pet. Br. 36, would eviscerate the very two-part test the government dutifully recites in its brief, U.S. Br. 12, and render those statutory rights that could be enforced pursuant to § 1983 a null set. Through the backdoor of "rebuttal analysis," the United States is asking this Court to take the radical step of overruling *Maine v. Thiboutot* by reading the "and laws" clause out of § 1983, as demonstrated below.

First, § 1983 unambiguously authorizes an aggrieved party to seek the relief enumerated therein for the deprivation of "any" "right[]" under the "laws" of the United States. 42 U.S.C. § 1983. Nowhere does it say that the absence of other judicial relief (or any other form of redress) is a precondition to the availability of remedies under § 1983, or that § 1983 is a civil action of last resort. Quite simply, § 1983 contains no hint of exclusivity.

Second, the rule advocated by the United States is contrary to more than one hundred years of jurisprudence. "Rights, privileges and immunities" granted by the Federal Constitution have been enforced by private parties against state actors since well before the passage of the Civil Rights Act of 1871. *See, e.g., McCulloch v. Maryland*, 17 (4 Wheat.) U.S. 316, 438 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824). Similarly, federal courts enjoined state action in conflict with federal statutes well before the passage of what is now § 1983. *See, e.g., Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 466 (1829). But the fact that judicial relief may be available independent of § 1983 to enforce federal law against state actors has never been held to work a per se ouster of § 1983. In fact, this Court has held exactly the opposite. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) ("[T]he fact that a federal statute has preempted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.").

Third, the United States' new rule guarantees that *no* statutory right will ever be enforceable under § 1983. That is because the very statutory indicia that would satisfy the

demanding first part of this Court's test for determining whether § 1983 relief is available (the existence of an enforceable federal "right" in the plaintiff) would, at the same time, constitute conclusive evidence that Congress intended to shut the door on any § 1983 remedy. Specifically, as to the first part of the test, the United States concedes, as do petitioners, that § 332(c)(7)(B) creates such a right. This means, as this Court explained in *Gonzaga* just three Terms ago, that there exists in the statute nothing "short of an unambiguously conferred right to support a cause of action brought under § 1983," and that § 332(c)(7) satisfies the standards articulated in this Court's implied right of action cases. *See* 536 U.S. at 283.

Indeed, as the Eleventh Circuit observed in *AT&T Wireless PCS*, there is no question that Congress intended that § 332(c)(7) confer benefits on particular individuals. By its terms, it allows "'[a]ny person adversely affected by any final action or falure to act by a State or local government . . . that is inconsistent with this subparagraph' to 'commence an action in any court of competent jurisdiction.'" 210 F.3d at 1326 (quoting 47 U.S.C. § 332(c)(7)(B)(v)). Nor is any right protected by § 332(c)(7) "so 'vague and amorphous' that its enforcement would strain judicial competence," 210 F.3d at 1326 (citation omitted), because it "imposes well-defined obligations on governmental entities," *id.*; *see* 47 U.S.C. § 332(c)(7)(B)(i)-(iv). In addition, "[t]he obvious inference" from Congress's decision to permit aggrieved parties to go to court pursuant to § 332(c)(7)(B)(v) "is that Congress itself believed that the rights protected [by the statute at issue] are not so vague and amorphous as to strain judicial competence." 210 F.3d at 1326. Finally, the statute's mandatory terms—"shall not unreasonably discriminate," "shall not prohibit or have the effect of prohibiting the provision of personal wireless services," and "shall [make any denial] in writing and supported by substantial evidence contained in a written record"—make clear that § 332(c)(7) "'unambiguously impose[d] a binding obligation' on the governmental body in question." *Id.* (citation omitted).

Under the United States' reasoning, the very satisfaction of the demanding "specific right" test enunciated in *Gonzaga* demonstrates Congress's intent to close the door on § 1983. As soon as the conditions for finding a right of action are satisfied, the statute will necessarily supply a cause of action and *some* avenue for "meaningful judicial review"; but the availability of that "meaningful judicial review" is always "sufficient" to find a comprehensive enforcement scheme that ousts § 1983 remedies. U.S. Br. 17 n.3. Thus, the United States conflates the two-part test for determining whether a right is enforceable under § 1983 into a single question (does an enforceable right exist?) to which *either* answer fails the test for the applicability of § 1983. This "heads I win, tails you lose" approach would eviscerate any enforcement of federal statutory rights through § 1983.[14]

B. Nothing in § 332(c)(7) Is Incompatible with the Judicial Remedies Made Available by § 1983.

Beyond what Congress *does not say*, none of what § 332(c)(7) *does say* evinces any congressional intent to "shut the door" on § 1983 relief. Petitioners do not even suggest that these limited procedural provisions—the 30-day statute of limitations and expedited review, 47 U.S.C. § 332(c)(7)(B)(v)—constitute a comprehensive enforcement scheme. Instead, they argue only that these provisions are inconsistent with the § 1983 remedy.[15] They are not.

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[14] Nor can the United States seriously contend that there is some difference between "explicit" or "express," U.S. Br. 4, 15, 21, and "implied" rights of action for purposes of its rule. Certainly it cannot be the United States' position that where Congress was less clear than in § 332(c)(7) about whether it intended to create a right of action, the § 1983 remedy should be more readily available. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

[15] Petitioners also suggest that the requirement in § 332(c)(7) that there be "final action or a failure to act by a State or local government," prior to bringing suit erects some sort of "exhaustion" requirement that is inconsistent with § 1983. Pet. Br. 32 n.10; *see* U.S. Br. 25 n.5. There is, however, *no* requirement in § 332(c)(7) that applicants exhaust administrative remedies, such as by appealing any adverse decision to a board of review, filing a petition for reconsideration, or pursuing judicial review in state court. This is not a case where there is some *separate* and *additional*

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First, the centerpiece of petitioner's case for incompatibility – the "dramatic inconsistency" between the statute of limitations applicable to a § 1983 action in the abstract and the 30-day limitations period in § 332(c)(7), Pet. Br. 28; *see* U.S. Br. 23-25 – is ephemeral. Indeed, in their efforts to manufacture a conflict between the § 1983 and § 332 limitations periods, petitioner and the United States cannot even agree on what the applicable statute of limitations under § 1983 is or from whence it could be "imported." *Compare* Pet. Br. 28, 34 n. 11 (arguing that a four-year statute of limitations applies under 28 U.S.C. § 1658 and this Court's decision in *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836 (2004)), *with* U.S. Br. 23 & n.4 (arguing that the limitations period for a § 1983 action would be "either the four-year period provided for in 28 U.S.C. 1658 . . . or the appropriate limitations period under *Wilson v. Garcia*, 471 U.S. 261, 267 (1985)"). Neither is correct. There is *no* inconsistency: the limitations period for a § 1983 action brought to enforce § 332 rights can only be 30 days, as respondent explains.

It is beyond dispute that there is no "specific statute of limitations governing § 1983 actions." *Wilson*, 471 U.S. at 266. Where the underlying federal rights are constitutional rights, they clearly do not contain their own limitations period, and this Court thus has developed judicial tools for determining the appropriate limitations period. Before Congress in 1990 enacted the federal catch-all statute of limitations, 28 U.S.C. § 1658, this Court faced the same task as to federal statutory rights. In both cases, the "settled practice [was] to adopt a local time limitation as federal law." *Wilson*, 471 U.S. at 266-67. It is unclear whether the four-year federal catch-all statute of limitations, which applies only to "a civil action arising under an Act of

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administrative process that must be followed before bringing suit. The first action by a zoning board "under color of" state law allows the filing of a suit in federal court. These provisions do not conflict with § 1983 – rather, they reflect standard ripeness principles for challenging state action that apply in any federal case.

Congress enacted after [December 1, 1990]," would apply to a § 1983 action seeking to enforce a right that did not exist until after 1990.[16] U.S. Br. 23 n.4. Neither method is necessary here, however, where the underlying statute that creates the federal right at issue itself establishes a statute of limitations for all judicial relief.

Where the underlying federal statutory right does include its own statute of limitations – 30 days in the case of § 332(c)(7) – there is no reason to look beyond that specific limitations period. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991). Both the "settled practice" under *Wilson* and 28 U.S.C. § 1658 expressly recognize that a directly applicable federal statute of limitations always governs and makes either the borrowing exercise or resort to the federal catch-all period unnecessary. *Wilson*, 471 U.S. at 266-67 (identifying the practice as "adopt[ing] a local time limitation as federal law *if it is not inconsistent with federal law or policy to do so*" (emphasis added)); 28 U.S.C. § 1658 (applying a four-year statute of limitations to actions brought under a federal Act "*[e]xcept as otherwise provided by law*" (emphasis added)). There is simply nothing "inconsistent" in applying a federal statute of limitations connected to a specific statutory right in an action under § 1983.

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[16] If the United States were correct that, even after the enactment of 28 U.S.C. § 1658, courts must import the applicable state statute of limitations for § 1983 actions, Congress's failure to specify a statute of limitations or its adoption of a specific statute of limitations would always "conflict" with § 1983. This is because § 1658's four-year limitations period would apply to any new federal cause of action that was otherwise silent, and any statute of limitations connected to the new right would conflict with § 1983 unless it mirrored the most analogous state statute of limitations under *Wilson*. Under the United States' view, the only way Congress could create new federal rights and avoid the "dramatic inconsistency" manufactured by the government would be to conduct the *Wilson* enterprise itself and specify that federal courts should engraft the applicable state statute of limitations onto the new federal cause of action, thereby achieving "consistency" with § 1983.

Second, contrary to petitioners' suggestion, Pet. Br. 28-29; *see* U.S. Br. 23-24, there is no conflict between Congress's direction that courts "shall hear and decide" § 332(c)(7) "action[s] on an expedited basis," 47 U.S.C. § 332(c)(7)(B)(v), and § 1983 relief. Even assuming that the requirement of "expedited" treatment has any teeth—a proposition belied by the procedural history of this very case[17]—it does not suggest any congressional hostility to § 1983 remedies.[18] The expedition requirement of § 332 *supplements* the procedures available under § 1983, but it does not *conflict* with them.

C. Petitioners' Argument that § 332(c)(7) Incorporates or Emulates Local Zoning Law Is Specious.

Much of petitioners' and their supporting *amici's* incompatibility argument rests on the extraordinary proposition that a federal law born of the recognition that local zoning law and procedures were stifling federal communications policy somehow adopted wholesale principles of local zoning law. Petitioners boldly assert that § 332(c)(7) "reflects a concerted effort to preserve and emulate traditional [state zoning] procedures." Pet. Br. 42.

The notion that Congress, frustrated with the Byzantine tangle of state zoning requirements and the obstructionist policies of certain local zoning administrations, would have adopted § 332 solely to "emulate" these policies defies logic. Even the United States concedes that the "antenna siting decisions [of local zoning boards] historically have threatened to impede the development of wireless communications." U.S. Br. 2. It goes on to note that, "[w]hen Congress considered telecommunications reform, it found that zoning had impaired the development of the wireless telecommunications industry," and that because the 1996 Act was designed to promote competition and "encourage

[17] It took the district court over sixteen months to conclude that the City had violated Abrams's rights, and two more years elapsed before the Ninth Circuit issued its ruling.

[18] Moreover, as a procedural matter, nothing prevents zoning boards and applicants alike from requesting expedited treatment for § 1983 claims brought to vindicate rights under § 332, and nothing precludes a court from granting such treatment where it believes it necessary to efficient administration of the case.

the rapid deployment of new telecommunications technologies," § 332(c) was amended to "impose specific restrictions on state and local regulation of personal wireless service facilities." *Id.* at 2-3 (citations omitted). Indeed, petitioners' argument is conclusively refuted by § 332's legislative history. Congress did not disturb local zoning authority in 1993, and it was dissatisfaction with that state of affairs that led to the passage of § 332(c)(7) in 1996. "If Congress had sought [in the 1996 Act] to maintain the status quo, it could have dispensed with the provisions of the 1996 Act relating to zoning authority." *Hog Tight*, 50 COMM. L. J. at 587.

In fact, § 332(c)(7)(B) contains three significant new rights that have no analogue in "traditional" state zoning procedures. *See* 47 U.S.C. § 332(c)(7)(A) (preserving local zoning authority "[e]xcept as provided in" the rest of § 332(c)(7)).[19] First, local zoning authorities may not issue a decision that "prohibit[s] or has the effect of prohibiting" wireless service. *Id.* § 332(c)(7)(B)(i)(II). This confers upon wireless carriers a unique federal protection—regardless of the existence of other justifications for denying an application, a zoning board is foreclosed by § 332(c)(7) from making a decision that prohibits or has the effect of prohibiting wireless service.

The First Circuit summarized the dramatic effect of this new federal right: "[L]ocal zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services *violate the statute*," and thus justify the imposition of a remedial order. *Plainville*, 297 F.3d at 20, 25

[19] Courts have recognized that § 332(c)(7) contains new federal rights, and does more than simply authorize a zoning board appeal in federal courts. *See, e.g., Voicestream Minneapolis, Inc. v. St. Croix Cty.*, 342 F.3d 818, 833 (7th Cir. 2003); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-23 (1st Cir. 2002); *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9, 15-16 (1st Cir. 1999). To this end, where federal rights under § 332(c)(7) are at stake, such as non-discrimination and the bar on prohibiting service, courts have looked beyond the record below and admitted new evidence and testimony for their *de novo* review of the issues. This is not the stuff of administrative appeal.

(citations omitted) (emphasis added). Thus, even if a local zoning authority's decision is based on "substantial evidence," it will not be upheld if it has "the effect of prohibiting the provision of personal wireless services." *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 115, 117, 121 (D. Mass. 2000).

Second, neither local nor state governments may regulate the placement of personal wireless service facilities on the basis of the environmental effects of electromagnetic radiation, so long as these facilities meet FCC standards. 47 U.S.C. § 332(c)(7)(B)(iv). Prior to § 332(c)(7), local communities often justified blocking wireless facilities on ephemeral environmental concerns. *See supra* n.8; *When NIMBYs Attack*, 23 J. CORP. LAW at 493-94 ("NIMBYs zealously make the [argument that] RF [Radio Frequency] emissions [are harmful] despite the lack of a connection between the human health effects from exposure to EMFs from electrical power lines and the human health effects from exposure to RF from wireless towers."). As Congress recognized early in the drafting of the 1996 Act, "[a] high quality national wireless telecommunications network cannot exist if each of its component [sic] must meet different RF standards in each community." H.R. Rep. 104-204, at 95. By eliminating this potential objection, Congress removed one of the most common methods for objecting to siting permits.

Third, § 332(c)(7) prohibits local zoning authorities from discriminating between providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I). This section was designed to "ensure" that zoning boards could not "unreasonably favor one competitor over another." *Id.* By grouping the various constituents of "personal wireless services" together and prohibiting unreasonable discrimination among them, Congress forbade localities from using technological differences as a justification for blocking new entrants from the market, a problem encountered nationwide. "[Zoning authorities] all over the country have been actively discriminating against new cellular providers in the name of property value and

aesthetics, or more appropriately, NIMBYism." *Boom or Bust*, at 517. Thus, it is clear that § 332(c)(7) is not a wholesale adoption of traditional state zoning principles.

II. SECTION 1983 REMEDIES ARE A NECESSARY TOOL TO PROTECT WIRELESS LICENSEES' FEDERAL RIGHTS.

A. Section 1983 Remedies Are Necessary To Make Some Licensees Whole.

Section 1983 is necessary to allow courts to fashion remedies where injunctive relief alone would be insufficient. In *Omnipoint Communications, Inc. v. City of White Plains*, 175 F. Supp. 2d 697 (S.D.N.Y. 2001), for example, the zoning authority's unlawful delay in acting on Omnipoint's permit application resulted in the carrier losing a lease on the private property where it intended to build the tower. *Id.* at 706. An injunction requiring grant of a permit would do no good in that circumstance; indeed, the court suggested that without the § 1983 claim, the carrier's cause of action would have been moot, and the city's unlawful conduct would have escaped redress entirely. *Id.* at 706-07.

Similarly, damages under § 1983 may be appropriate if a zoning authority imposes gratuitous or excessive fees on a carrier seeking a permit. In *Nextel v. Town of Randolph*, an ordinance required that Nextel pay a $38,000 application fee and a $38,000 permit review fee in order to construct a single tower. 193 F. Supp. 2d 311, 314-315 (D. Mass. 2002). While the court found this fee to be excessive under state law, and further found a violation of § 332(c)(7), it also held that § 1983 remedies were not available. *Id.* at 321, 322. Fortunately, the municipality in *Randolph* had not insisted on upfront payment of the illegal fees, but the case illustrates how the lack of a damages remedy can leave a carrier with no redress for a blatant violation of federal right.

By providing the possibility of attorney's fees under § 1988, § 1983 serves another vital role in siting disputes. Petitioners attempt to portray all potential § 332(c)(7) plaintiffs as large well-financed corporations, Pet. Br. 31, but § 332(c)(7)'s protections also apply to smaller licensees providing personal

wireless services. CTIA members like Farmers' Wireless, which serves a 50-mile section of the I-59 corridor in Alabama, and Poka Lambro, which provides service to West Texas, would benefit from coverage under § 1988. The respondent in this case is a classic example of a small, entrepreneurial licensee who would not be able to enforce his federal rights absent the incentives created by the possibility of a fee award.

Moreover, stripping away the possibility of attorney's fees would disproportionately harm new entrants, who may not yet have revenues as large as previously established players. One of the primary motivations underlying § 332 was to encourage new entrants to build out new technologies and services. *See* H.R. Rpt. 104-204, Pt. 1, at 94. It would be perverse for Congress to enact a law designed to encourage market entry and then have the courts effectively restrict its enforcement to only those players with enough money to take on wealthy municipalities such as Rancho Palos Verdes.

B. Section 1983 Suits Are Necessary To Effectuate Federal Policy and Rein In Egregious Misconduct.

With the passage of the 1996 Act, Congress avoided creating a Washington-based bureaucracy that would deprive local zoning authorities of any involvement in zoning decisions. H.R. Rep. 104-458, at 207. Congress also specifically directed the FCC to terminate any pending rulemaking that might produce a similar result. *Id.* at 208. Instead, § 332(c)(7) gave wireless providers a set of procedural and substantive federal rights and authorized them to challenge local zoning decisions in federal court. The vigorous enforcement of these rights by private parties is thus the primary method that Congress selected to advance its goal of encouraging build-out of wireless infrastructure.

Experience has shown that every available remedial device and incentive to adhere to federal law is necessary in this realm. While numerous local zoning authorities work with wireless carriers to enable the delivery of new services, there remain many post-1996 Act instances of egregious local zoning authority misconduct.

- ***Telespectrum, Inc. v. Pub. Serv. Comm'n***, 227 F.3d 414, 417-18 (6th Cir. 2000) (public service commission could not justify denial of a permit to construct a tower when: (1) all surrounding land was agricultural; (2) "[w]ithin one thousand feet of the site [were] the remains of a burned-out single family residence, a yard containing ten to twelve automobiles in varying states of disrepair, a home built around a manufactured house and surrounded by tires and debris, and [a] single family ranch home"; (3) the provider offered evidence from engineers indicating importance of particular site; and (4) one of two objectors to the tower, who both lived in the "single family ranch home," challenged tower based on a "personal belief" the tower would negatively affect health and property values and on a belief that "the tower could be located at four [other] sites[,] showing photographs he had taken from his car as evidence").
- ***Omnipoint Communications, Inc. v. Vill. of Tarrytown***, 302 F. Supp. 2d 205, 208-216, 225 (S.D.N.Y. 2004) (permit application to install flush-mounted antennae on the side of a non-residential building, where a competitor already had facilities, was denied after eight separate public hearings spanning nearly one year, including numerous and repetitive requests on the part of the planning board and its consultants to study alternative sites that "would have 'transform[ed] the application into a self-perpetuating, endless odyssey'" (citations and quotations omitted)).
- ***Omnipoint Holdings, Inc. v. Town of Westford***, 206 F. Supp. 2d 166, 172-173 (D. Mass. 2002) (zoning board demonstrated "such fixed hostility" to permit applications that further applications would be useless; zoning board noted zoning bylaws precluded grant of application because there were "other uses" for the property, such as residential development, and Board member insisted that the

proposed tower was "nasty" and she "[didn't] want to look at it" (citations omitted)).

- ***Nextel Partners, Inc. v. Town of Amherst***, 251 F. Supp. 2d 1187, 1194-1995, 1201 (W.D.N.Y 2003) (zoning board "willfully disregarded the law" through discrimination when it denied carrier's request to place antennae on an existing tower that had three other wireless facilities already on it, after granting a similar application for another carrier two months earlier).
- ***White Plains***, 175 F. Supp. 2d at 701-707, 716-717 (after eight months, zoning board denied application to construct a tower, causing carrier to lose lease on tower site; zoning board disregarded detailed evidence that the aesthetic and property value impact of the tower would be low, including photo simulations, crane studies, and evidence based on actual home sales near cell towers, in favor of "unsupported fears of local residents" and "unsubstantiated opinions that property values would decrease"; unfounded implications made by zoning board of "chicanery...could be viewed as a reflection of an unacceptable bias on the part of the Board").

These decisions are not "mistake[s] in implementing the Act's often complex requirements," Pet. Br. 30, but are bald denials of federal rights by officials acting under color of state law. Congress established the protections in § 332(c)(7) to free wireless carriers from the "self-perpetuating, endless odyssey" that local zoning regulators can force carriers to endure. *Tarrytown*, 302 F. Supp. 2d at 225 (quotation omitted). There is no "distort[ion of] the decision-making process" from the threat of such suits. Pet. Br. 31. Rather, suits to enforce federal rights are vital to deterring local authorities such as those in *Tarrytown*, *Westford*, *Amherst*, and *White Plains* from "willfully disregard[ing] the law and wrongfully den[ying]" permit applications. *Amherst*, 251 F. Supp. 2d at 1201.

The availability of § 1983 claims enhances this deterrent effect. In particular, the "threat of attorneys' fees could influence zoning boards to ensure that their decisions comply with the [1996 Act]." *Smart SMR of New York v. Zoning Comm'n of the Town of Stratford*, 9 F. Supp. 2d 143, 148 (D. Conn. 1998). Clarifying that § 1983 remedies are available would also encourage carriers to use this tool, increasing private enforcement of congressional policy under § 332. Suits containing § 1983 remedies help ensure that zoning boards, who have ultimate control over whether wireless carriers can build or refurbish national networks, do not focus on the interests of their local constituents to the exclusion of the "national interest" in expeditiously building out a wireless communications infrastructure. H.R. Rpt. 104-204, Pt. 1, at 94. Localities should not be allowed to hold technological progress hostage. *See Lincoln*, 107 F. Supp. 2d at 121 ("A universal technological advance cannot be permanently stayed by a local stratagem devised to preserve the character and beauty of a locality.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CERTAIN INDIVIDUAL RANCHO PALOS VERDES RESIDENTS, PROPERTY OWNERS AND TAXPAYERS AND UNITED RADIO AMATEUR CLUB, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE* [1]

Amici Don Reeves, Barry Hildebrand, Harold Hermann, Sunshine, Skip Hansen, and Joe Lai are residents, property owners and taxpayers of Petitioner City of Rancho Palos

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of *amicus curiae* briefs in this case and have filed blanket consent letters with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Verdes whose own property uses will be affected by the outcome of this case. Further, they benefit from the provision of personal wireless services in the City and are concerned that the inability of small businesses and entrepreneurial personal wireless service providers to seek recourse to 42 U.S.C. §§ 1983 and 1988 will remove a significant incentive for the City to faithfully comply with the Telecommunications Act of 1996 with the effect that it will impair the development of a more robust wireless services infrastructure in a community that now suffers from inadequate service to the ultimate injury of the *amici* and other residents who benefit from that infrastructure.

Amicus United Radio Amateur Club, Inc., a California non-profit mutual benefit corporation, is an organization of amateur radio operators whose members include residents, property owners and taxpayers in the City of Rancho Palos Verdes who will suffer similar harm as the above-named *amici* if the Court forecloses access to 42 U.S.C. §§ 1983 and 1988 by personal wireless service providers.

QUESTION PRESENTED

Where a municipality violates the rights of an individual as established by the Telecommunications Act of 1996, specifically 47 U.S.C. § 332(c)(7)(B), may the injured individual assert a claim for damages under 42 U.S.C. § 1983 and attorney's fees under 42 U.S.C. § 1988(b)?

ARGUMENT

Respondent Mark Abrams, a licensed amateur radio operator and antenna owner who also provides commercial mobile radio services from his home, has been the target of a years-long crusade by City of Rancho Palos Verdes officials who have used virtually every administrative and legal means to force him to submit to their will. The District Court having determined that the City violated the Telecommunications

Act of 1996 (TCA) and Abrams having withstood the *in terrorem* financial assault of years of litigation against a municipal corporation of superior means, Abrams now seeks to collect recompense of attorney's fees under 42 U.S.C. § 1988(b) and damages under 42 U.S.C. § 1983.

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE TELECOMMUNICATIONS ACT OF 1996 ESTABLISHES A FEDERAL RIGHT AND THAT THIS RIGHT IS SUBJECT TO 42 U.S.C. §§ 1983 AND 1988

A. 47 U.S.C. § 332(c)(7)(B) Unambiguously Confers a Federal Right

Consistent with the Court's direction in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B), unambiguously confers rights on specific parties ("any person adversely affected by any final action or failure to act . . . that is inconsistent with this subparagraph") to enforce the mandatory provisions of 47 U.S.C. § 332(c)(7)(B)(i)-(iv) in a manner that binds "State or local government or any instrumentality thereof."

In contrast to the cases cited in *Gonzaga v. Doe*, 536 U.S. 273 (2002), the rights conferred by 47 U.S.C. § 332 (c)(7)(B) do not arise from presumptions relating to a funding provision.

Contrary to the dictum *Amici* State of Alabama, *et al.*, cite from *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942), and distinguished in *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972), the authority of the Court and Mr. Abrams' standing to sue are not at issue in this case. *Amici* State of Alabama, *et al.*, put too much weight on a comment in *Scripps-Howard* that was not necessary to the issue being decided and merely served to make a point: namely that, even if entirely public—as opposed to private—interests were at risk, the Court would

still have the power to stay administrative actions. This Court said as much in *Sierra Club* when it referred to the cited passage, as "a dictum" in holding that the Sierra Club's mere interest in a public issue, absent some private injury, was insufficient to establish standing.

B. 47 U.S.C. § 332(c)(7) Does Not Establish a Remedial Scheme So Comprehensive As to Establish Congressional Intent to Foreclose § 1983 Remedies

In the absence of an express Congressional prohibition against recourse to § 1983, Petitioners must establish that Congress *implied* a prohibition by creating an enforcement scheme so comprehensive and exclusive that it is incompatible with individual enforcement under § 1983. *Blessing* at 341.

It is established that the presumption *favors* application of § 1983 and that the burden is on the opponent to overcome this presumption. *Blessing* at 341.

Petitioners and *Amici* State of Alabama, *et al.*, appear to argue that the only statutes subject to § 1983 would be those where a federal right was created with nothing more. Under their interpretation, only the utter silence of Congress in the matter of individually-enforceable remedies at law would satisfy the presumption favoring application of § 1983. Any mention whatsoever of individual access to the courts would necessarily be construed as a remedy so comprehensive and exclusive as to preclude the application of § 1983. Br. of Petitioners at 33-34; Br. of *Amici* State of Alabama, *et al.*, at 10-12.

C. "Expedited Review" and a 30-day Limitations Period Benefit the Wrongdoers, Not the Respondent

Amici National League of Cities, *et al.*, point out that the parties served by the provision in 47 U.S.C. § 332(c)(7)(B) for an "expedited review" are the municipalities themselves. Br. of *Amici* National League of Cities, *et al.*, at 19.

If anything, the necessity that Mr. Abrams rush out and find a competent attorney in an esoteric field of law to file suit within a very short period of limitations only adds to the financial inequities burdening injured individuals and small entrepreneurs like Abrams and should favor the application of § 1983 to balance the equities to aid "the proverbial little guys." Br. of *Amici* State of Alabama, *et al.*, at 18.

II. THE BALANCE OF EQUITIES FAVORS INDIVIDUALS SUCH AS ABRAMS OVER OFFICIALS WITH THE POWER OF THE PUBLIC PURSE

The balance of financial equities attending the Ninth Circuit's application of §§ 1983 and 1988 favors individuals and small entrepreneurs like Abrams, who face the very real prospect of personal bankruptcy should they be so unfortunate as to end up in court against City Hall.

The Petitioners and supporting *amici curiae* essentially argue that, if they violate an individual's rights with regard to an antenna zoning decision, and if the injured individual has the strength of character and determination to overcome years of aggressive litigation and appeals by a government party of significantly superior financial backing that is often able to spread the risk through mutual insurance pools (Br. for *Amici Curiae* National League of Cities, *et al.*, at 21), the worst that can happen is the municipal corporation might be ordered to stop doing the bad act. This is an empty remedy with no deterrence value to curb government abuse.

Although Petitioners and supporting *amici curiae* raise the specter of impecunious municipal governments subject to potential liability for damages and attorney's fees when they 'innocently' misapply federal law (Br. for *Amici Curiae* National League of Cities, *et al.*, at 20, 21-23), and assert that "telecommunications conglomerates" are the typical plaintiffs who would seek to assert § 1988 (Br. for *Amici Curiae* National League of Cities, *et al.*, at 4), it is injured small entrepreneurs like Mark Abrams who are far more likely to be the victims of aggressive government zoning officials.

Most individuals on the wrong-side of municipal zoning decisions do not have attorneys on retainer, nor do they have networks of relationships with legal experts in esoteric fields like antenna zoning law.

Governments, on the other hand, have legal experts on staff or retainer, years of corporate knowledge, and a plethora of special associations such as *Amicus* California State Association of Counties (CSAC), *Amicus* League of California Cities, etc., to enable them to field legal teams with the best reputations and experience. Government officials often have armies of staff members, code enforcement officers, police agencies, investigators, hearing officers and attorneys, all on the government payroll, to assert their administrative remedies, criminal and civil sanctions.

Although the National League of Cities, *et al.*, assert the tired canard that money spent to pay damages awards would detract from money spent on police and fire service (Br. of *Amici* National League of Cities, *et al.*, at 21), they hope the Court will ignore the reality that government officials often find it convenient to spend other people's money to prove a point or to flex their political muscles.

Perhaps the only reason the Court has the opportunity to review this case is because Mark Abrams is rare in that he's had the strength of character and modest financial ability to stick it out this far.

In many cases, legal rights, statutes and precedent are of no succor to impecunious individuals because the *only* factor affecting the outcome of many zoning decisions is whether one has the financial wherewithal to withstand the full force of aggressive code enforcement and litigation by City Hall. Without the ability to assert § 1983, these individuals will continue to suffer in silence.

The planning decisions by the City of Rancho Palos Verdes in this case were not necessarily matters of innocent "misapplication" of federal law. Mr. Abrams was subjected to often angry and contentious public hearings where public officials attacked his character and made him the object of public opprobrium. City officials made it abundantly clear that they intended to restrict antenna permits, and especially commercial antennas, regardless of what laws were enacted by higher echelons of government. City officials drafted the City's antenna zoning ordinance to craft provisions that singled-out specific property and antenna owners in an attempt to effectively prohibit their services.

Based upon our observations and experience as residents of the City of Rancho Palos Verdes, it appears that many times the City pushes matters to litigation that easily could be settled, if only because its relatively greater financial strength gives it an advantage in a legal forum. City officials have actually raised the prospect of *in terrorem* legal expenses suffered through long and aggressive litigation in dissuading individuals from challenging the City and they have admittedly engaged in such tactics during litigation. As a result, many citizens and local extrepreneurs live with an abiding fear of retaliatory code enforcement and permit denials.

Without the potential risk of having to pay damages or attorney's fees, municipalities will have every incentive to aggressively assert local zoning ordinances potentially inconsistent with the TCA and to postpone or deny satisfaction of injuries through aggressive litigation.

Although our taxes may be used to pay attorney's fees and damages when cities abuse their zoning powers, as taxpaying landowners we are much more concerned about the prospect that a U.S. Supreme Court judgment in favor of the Petitioners would tend to aggravate the arrogance of municipalities that seek to aggressively assert local zoning regulations inconsistent with the TCA that are injurious to entrepreneurs like Mr. Abrams and the citizenry that benefits from the provision of such wireless services.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF JAMES A. KAY, JR. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Mr. Kay has been a Federal Communications Commission licensed provider of business and commercial mobile radio services since 1973. His business specializes in the installation, maintenance, design, operation and sales of air time for two-way radio communication systems in California. He has had vast experience in dealing with local governments and their zoning codes in the siting and construction of radio antennas.

As noted in petitioner's brief, Mr. Kay has challenged a resolution of petitioner City of Ranchos Palos Verdes (the City), which resolution denied him a permit to operate commercially on a pre-existing, approved amateur antenna structure, just as the City denied respondent Abrams a similar permit. Brief of Petitioner at 11 n.4. In *Kay v. City of Rancho Palos Verdes*, No. CV 02-3922-DSF (C.D. Cal May 15, 2002), the district court ruled that the resolution denying Mr. Kay's permit was not supported by substantial evidence, as required by 47 U.S.C. § 332(c)(7), the Telecommunications Act of 1966 provision that is at issue before this Court.

The district court ordered that the resolution denying Mr. Kay's permit be set aside and that Mr. Kay be allowed to use his approved amateur antenna structure for commercial purposes, subject to reasonable conditions. The court further ordered that Mr. Kay is entitled to seek an award of damages,

---

1. No counsel for a party authored this brief in whole or in part. No person or entity other than James Kay made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of all amicus briefs; their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

pursuant to 42 U.S.C. § 1983, but the damages claim and Mr. Kay's pending motion for attorney's fees under 42 U.S.C. § 1988 have been stayed until June 2005, pending the Court's decision in this case.

Having spent several hundred thousand dollars to force the City to permit that which federal law requires – and having undergone treatment at the City's hands that mirrors that which the City accorded to Mr. Abrams – Mr. Kay has a keen interest in the issue on which this Court has granted certiorari. And Mr. Kay's experience shows, if nothing else, that Mr. Abrams' case is not an isolated event. It has happened twice within the past year in one city alone, and no doubt has played out in other municipalities as well. Mr. Kay can well speak – with the voice of his experience – to the issues before the Court.

SUMMARY OF ARGUMENT

Both the City and *amicus* The National League of Cities (NLC) argue that the Ninth Circuit erroneously upheld Mr. Abrams' right to seek relief under 42 U.S.C. § 1983 (and, correspondingly, under 42 U.S.C. § 1988) because, in their view, 47 U.S.C. § 332(c)(7) is essentially borrowed from state zoning codes and such codes do not generally allow for an award of damages or for attorney's fees. Brief of Petitioners at 41-45; Brief of the National League of Cities, *etc.* (NLC Brief) at 7-23. The NLC, in particular, takes great pains to identify every supposed significant similarity between the review scheme established by the Congress in Section 332(c)(7) — which similarities come down, in the end, to the unremarkable provisions for a 30-day filing deadline, a finality requirement, and application of long-established administrative "substantial evidence" standard

— and then, in one huge leap, asserts that Section 332(c)(7) must be construed to bar relief under Section 1983 because "damages are traditionally unavailable" in state zoning appeals. NLC Brief at 7-17.

The City and the NLC are attempting to create Congressional intent from whole cloth, and then to bootstrap that purported intent into an argument that an unambiguous statute must be interpreted to bar a Section 1983 claim — when the statute is utterly *silent* on any such intent. But they cannot be heard to invent Congressional intent and to rewrite an unambiguous statute in a manner that overcomes established presumptions to the contrary.

STATEMENT OF THE FACTS

Mr. Kay adopts the Statement of the Facts in respondent's brief, insofar as that statement reflects the proceedings in Mr. Abrams' case. Because, as noted in the discussion of Mr. Kay's interest in these proceedings, the City meted out to Mr. Kay treatment quite similar to that which it inflicted upon Mr. Abrams — and did so *after* the district court in this case had ruled in Mr. Abrams' favor — a brief review of the municipal permitting process, as that process was applied on Mr. Kay's application for his permit, may be illuminating for the Court.[2]

On June 21, 2001, Mr. Kay applied to the City for a Conditional Use Permit (CUP) to allow him to use his lawful amateur antenna structure, located atop an unoccupied single-

2. The appendix to this brief comprises the district court's order and an excerpt of the record on Mr. Kay's application before the City.

family residence, for commercial purposes. App. 8. Like Mr. Abrams' antenna, Mr. Kay's antenna structure was capable of transmitting and receiving amateur and/or commercial radio frequencies, without alteration.

The City's Senior Planner reported to the City's Planning Commission at the first hearing on Mr. Kay's application that the antenna structure previously had been approved for non-commercial use and that the City's staff recommended approval of the CUP application. App. 10. The Commissioners, however, voiced their inclination to impose harsh conditions on the approval (CAR 1:39:0292) — and ultimately voted to impose many of those conditions, including, among other things: (i) reducing the approved rooftop amateur structure from five to two masts, and limiting those masts to amateur use only, in exchange for allowing commercial use of interior antennas located in the house's master bedroom (CAR 1:39:0277-78); (ii) requiring Mr. Kay (or another person) to use the presently unoccupied house as a primary residence (CAR 2:42:0372); (iii) requiring Mr. Kay "to agree to whatever shared use by third parties is requested by the City," *i.e.*, Mr. Kay would be compelled to allow others to operate commercially using antennas inside an occupied residence (CAR 2:42:0368); and (iv) precluding Mr. Kay from using his driveway so that the driveway would always be available for rare visits by service vehicles (CAR 2:42:0339).

The City Attorney eventually was moved to say that, "the more we talk about this, the more uncomfortable I am with it because . . . we are walking into a potential argument that

we are going too far," in that the Commission was "walking into a problem" — to which one Commissioner responded:

> Well, but if he is going to sue us on the grounds that he wants to really use the property for more amateur antennas, fine. So be it. Then we will find if this use maybe really is amateur. I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy [Mr. Kay] and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to hell and let them sue us.

(CAR 2:42:0358). App. 63-64.

Ultimately, the Planning Commission and the City Council voted to grant the CUP, but subject to a total of 22 conditions, which conditions included provisions that denied Mr. Kay the use of the rooftop antennas (and required him to remove three of the existing five antennas). App. 8-12. In granting Mr. Kay relief under Section 332(c) of the TCA, the district court applied the "substantial evidence" standard of 47 U.S.C. § 332(c)(7)(B)(iii) and held, in part:

> When the Court considers that Kay's five mast structure had, by the time of the Council's decision, been lawfully in place for at least three years, the City's purported concerns are "too little, too late." What might have justified denial of either a commercial or amateur application in 1998 cannot justify denial when that same

structure has been accepted, however grudgingly, by the community for at least three years. .... These reasons are not sufficient *today* to justify removal of three antennas.

* * * *

There is no evidence concerning which specific "health, safety and welfare" concerns would mandate removing three of five antennas, especially when the record evidences no concerns on these subjects raised during the previous several years. To the extent that those concerns relate merely to changing frequencies, the City apparently concedes its inability to regulate in this area.

* * * *

> The Court therefore finds the Council Resolution requiring Kay to remove three of his five existing antennas is not supported by "substantial evidence contained in a written record."

App. 21-23 (original emphasis). The court ordered the City to issue its permit allowing commercial use of Mr. Kay's five-mast antenna structure. *Id.* at 24.[3]

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3. As noted earlier, the court followed the Ninth Circuit's decision in this case, but the proceedings on damages and attorney's fees have been stayed pending this Court's decision.

ARGUMENT

THE TELECOMMUNICATIONS ACT'S PROVISIONS FOR JUDICIAL REVIEW OF LOCAL GOVERNMENTAL ORDERS DENYING REQUESTS FOR PLACEMENT OF PERSONAL WIRELESS SERVICE FACILITIES CANNOT BE CONSTRUED TO DENY ACCESS TO RELIEF UNDER 42 U.S.C. § 1983.

A. The Analytical Framework.

Section 332(c)(7) of the Telecommunications Act of 1996 (TCA) establishes a limited federal right to seek review of local zoning decisions on "the placement, construction and modification of personal wireless facilities." 47 U.S.C. § 332(c)(7)(A). Among other provisions, the statute requires that a decision denying a permit request for wireless facilities must be "in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). An aggrieved applicant may seek review of a permit denial (or a local government's failure to act on a permit request) in state or federal court, "within 30 days after such action," and the reviewing court "shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v).

Neither petitioners nor their *amici* dispute that Section 332(c)(7)(B)(iii) creates a federal right, or that 42 U.S.C. § 1983 may be invoked to enforce a federal statutory right. Nor does there appear to be a dispute that, as the Ninth Circuit noted, *Abrams v. City of Rancho Palos Verdes,* 354 F.3d 1094, 1096 (9th Cir.), *cert. denied,* 125 S. Ct. 26 (2004), this Court's precedent creates a rebuttable presumption that one who is vested with a federal statutory right may ordinarily seek relief under Section 1983. *E.g., Blessing v. Freestone,* 520 U.S.

329, 340-41 (1997). While the parties have addressed the "comprehensive enforcement scheme" standard set forth in *Blessing*, 520 U.S. at 341, Mr. Kay will focus on the argument, primarily advanced by the NLC, that the purported importation of state zoning law concepts into Section 332(c)(7) requires that the provision be read to bar relief under Sections 1983 and 1988, thereby overcoming the *Blessing* presumption.

The NLC purports to overcome the presumption by superficially analyzing the procedural mechanisms established by the Congress in Section 332(c)(7). NLC Brief at 8-13. The NLC notes that Section 332(c)(7)(B)(v) imposes a 30-day deadline for seeking judicial review of a local government's decision, and finds it significant that 30-day time limits "have a venerable provenance in early zoning law and continue to be widely used in state zoning law review schemes." NLC Brief at 8. Second, the requirement that review be restricted to "final" decisions, 47 U.S.C. § 332(c)(7)(B)(v), is deemed by the NLC to be significant because "[n]early every state review scheme is identical, in that virtually all allow parties 'aggrieved' or 'affected' by a 'final' state administrative zoning or permitting decision to challenge the decision in court." *Id.* at 10 (citations omitted). Finally, NLC cites the very federal right that it seeks to remove from Section 1983's ambit, Section 332(c)(7)(B)(iii)'s requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record," and asserts that this provision reflects the Congress's purported intent to import state zoning law principles into the TCA's judicial review mechanism, because state courts generally apply a "substantial evidence" test on judicial review of zoning decisions. *Id.* at 11-13.

From these utterly unremarkable similarities — as will be set forth below, each cited provision can just as easily be traced to non-zoning law — NLC asserts that "neither damages nor attorney's fees would constitute 'appropriate relief' in actions brought under § 332(c)(7)(B)(v)" because "damages are traditionally unavailable where a board of adjustment or city council incorrectly denied a permit." NLC Brief at 17. But NLC's construct is an unalloyed contrivance. Fundamental statutory construction principles bar NLC's effort to create an otherwise non-existent legislative history from extrinsic sources that have neither a relation to any statutory language nor any basis in legislative history.

B. Extrinsic Sources of Purported Congressional Intent Have No Place in Construing an Unambiguous Statute.

It is notable that NLC finds no ambiguity in Section 332(c)(7)(B)(v). NLC Brief at 7. Nor does the City. Brief of Petitioner at 21-49. How it is that the NLC can turn to extrinsic sources to elucidate legislative intent, including, for example, model codes, state zoning laws, governmental statistics and newspaper articles, is left unexplained. But "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 124 S. Ct. 1756, 1761 (2004) (citation omitted). Here, as in so many instances, it must also end there.

"[I]t is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'"

Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (citation omitted). In the absence of ambiguity in the statutory language, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (citation omitted). Thus, without statutory ambiguity, there is no basis for consulting *any* extrinsic source, even one as well recognized as legislative history.[4] Bereft of any evidence of Congressional intent to import state zoning law — and some concomitant limitations on awarding damages — into Section 332(c)(7)(B)(v), the City and the NLC turn, as previously noted, to a bewildering array of state zoning statutes and decisional law.

This Court, however, uniformly has rejected such efforts to create legislative history. *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) (Congressional intent in adopting statute could not be drawn from committee report issued five years after statute's adoption, at time of amendment to statute; report "would not suffice to fix the meaning of language which that reporting Committee did not even draft"); *Western Air Lines v. Board of Equalization of South Dakota*, 480 U.S.

4. Neither the City nor the NLC rests much of their argument on the very terse legislative history that exists for Section 332(c)(7)(B)(v). See Brief of Petitioners at 26, 38 n.12, 46 n.15; NLC Brief at 7, 11. This is so, quite obviously, because that history is utterly unilluminating, at least when it comes to addressing the attempt by the City to add new provisions to Section 332(c)(7)(B)(v). The Conference Report on the 1996 amendments to the TCA shows only that the Congress viewed judicial review under Section 332(c)(7) as an "appeal," and stated that the "substantial evidence" standard was to be construed as "the traditional standard used for judicial review of agency actions." H.R. CONF. REP. NO. 458, 104TH CONG., 2D SESS. 208-09 (1996). As will be discussed *infra*, neither that history nor Section 332(c)(7)(B)(v)'s text are of any assistance to the NLC's argument.

123, 130 n.* (1987) (sparse legislative history cannot be augmented by "the creation of legislative history through the *post-hoc* statements of interested onlookers"); *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (rejecting argument that statute should be interpreted to adopt federal appellate court's interpretation of Congressional language; while "a few comments in the hearings . . . may suggest that the language bears the interpretation . . . none of those statements was made by a member of Congress, nor were they included in the official Senate and House Reports"; Court "decline[d] to accord any significance to those statements") (citations omitted). The NLC's attempt to "creat[e] . . . legislative history," *Western Air Lines*, 480 U.S. at 130 n.*, goes even farther afield.

C. The City and the NLC Cannot Demand That the Court Must Import State Zoning Law Limitations on Awarding Damages on Appellate Review into Section 332(c)(7)(B)(v).

The NLC asks the Court to import state zoning statutes that "grant local governments immunity from damages liability for zoning decisions" and case law that bars such damages, by virtue of the procedural similarities that the NLC identifies between Section 332(c)(7)(B)(v) and state zoning procedures. NLC Brief at 17.[5] The indicia upon which the

5. The statutory provisions upon which NLC relies, NLC Brief at 17 n.6, are state sovereign immunity statutes. ALA. CODE § 11-47-190 ("[n]o city or town shall be liable for damages or injury done to or wrong suffered by any person . . . , unless such injury or wrong was done or suffered through the neglect, carelessness or unskillfullness of some agent . . . of the municipality engaged in work therefor"); CAL. GOV. CODE § 818.4:

(Cont'd)

(Cont'd)

> [a] public entity is not liable for injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit . . . or similar authorization where the public entity . . . is authorized . . . to determine whether or not such authorization should be issued, denied, suspended or revoked.

DEL. CODE ANN. TIT. 10, § 4011(b)(2) ("a governmental entity shall not be liable for any damage claim which results from * * * [t]he undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial"); IDAHO CODE § 6-904B(3):

> [a] governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct . . . shall not be liable for any claim which * * * [a]rises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke a permit, license, certificate, approval, order or similar authorization.

S.C. CODE ANN. § 15-78-60(1)-(2) ("[t]he governmental entity is not liable for a loss resulting from * * * legislative, judicial, or quasijudicial action or inaction [or] administrative action or inaction of a legislative, judicial, or quasi-judicial nature"); TENN. CODE ANN. § 29-20-201:

> all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any

(Cont'd)

NLC relies to reach this conclusion are far too slender to support it.

First, the NLC relies on the 30-day time limit for seeking relief under Section 332(c)(7)(B)(v). NLC Brief at 8-10. The NLC's exegesis of state zoning law notwithstanding, the legislative history is absolutely silent on the derivation of the 30-day time limit. The Court might as readily — and perhaps more logically — assume that the Congress derived the 30-day time limit from Rule 4(a)(1) of the Federal Rules of Appellate Procedure. That the Congress elected to use such a standard deadline hardly indicates an intent to import wholesale all aspects of state zoning law procedure into Section 332(c)(7)(B)(v).

Next, the NLC argues that the requirement of finality in Section 332(c)(7)(B)(v) "emulates state judicial review

(Cont'd)

> of their functions; statute affords "[c]omplete and absolute immunity . . . for the free exercise and discharge of the duties of . . . boards, commissions, authorities and other governing agencies.

But statutes granting sovereign immunity are of limited — if any — utility in this analysis, because sovereign immunity may not be asserted to shield a municipality or other local government from liability under 42 U.S.C. § 1983. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 166-67 (1993); *Howlett by and through Howlett v. Rose,* 496 U.S. 356, 375-81 (1990); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980). The Congress could not conceivably have imported state sovereign immunity statutes into Section 332(c)(7)(B)(v) to immunize municipalities and other local governments from liability under Section 1983, when this Court has so firmly established that no such immunity extends to such entities under Section 1983.

provisions." NLC Brief at 10. That may be true, but the provision also "emulates" 5 U.S.C. § 551(13), under which a denial of a requested license constitutes final agency action that is subject to judicial review. Once again, the non-unique requirement of finality before a court may review a lower tribunal's ruling is hardly an indicium of the intent that NLC would have ascribed to the Congress.

Finally, the NLC relies on Section 332(c)(7)(B)(iii)'s requirement of "substantial evidence" to support the local government's ruling. NLC Brief at 11-13. Once again, the NLC overreaches. The "substantial evidence" standard of review has long been established in *federal* law for judicial review of agency action. *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 491 (1951). Its inclusion in Section 332(c)(7)(B)(iii) hardly shows an intent to import a body of *state* law. For that matter, the Congress's use of what is nothing more than a well-established standard for judicial review says *nothing* about whether damages or attorney's fees should – or should not – be available when a basis for such awards is shown.

What this brief analysis readily shows is that NLC cannot ascribe to the Congress the intent to import state zoning law concepts, on which the NLC's effort to support a denial of access to Section 1983 remedies entirely depends. This Court has long looked with great care at construction arguments derived from the Congress's purported adoption of a pre-existing state enactment:

> The "general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretation of the wording * * * is a presumption of legislative

> intention * * * which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence of lack of other indicia of intention."

Yates v. United States, 354 U.S. 298, 309 (1957) (citation omitted).

In *Shannon v. United States*, 512 U.S. 573 (1994), the Court applied that principle in addressing a criminal defendant's argument that the federal Insanity Defense Reform Act, which was derived from a District of Columbia statute, silently had imported the District's requirement of a special not guilty by reason of insanity verdict. *Id.* at 580-82. The Court noted that the principle quoted above "is merely a 'presumption of legislative intention' to be invoked only 'under suitable conditions.'" *Id.* at 581 (citation omitted). And, despite a passage in the legislative history indicating an intent to adopt the District's procedure, the Court refused to engraft that procedure onto the federal act:

> We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute. On its face, the passage Shannon identifies does not purport to explain or interpret any provision of the [act]. Rather, it merely conveys the Committee's "endorsement" of the [District's] "procedure" — a procedure that Congress did not include in the text of the Act. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative

> process. . . . "[C]ourts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point."

Id. at 583-84.

Here, there is *no* legislative history of any kind to support the NLC's attempt to read principles of state zoning law into the statute.[6] "[I]n the absence of anything in the legislative history indicating that [state decisions] were called to [the Congress's] attention, we should not assume that Congress was aware of them." *Yates,* 354 U.S. at 310. And the purported indicia of Congressional intent are simply far too

6. Contrary to the impression that is created in the NLC's brief, Section 1983 is available for aggrieved property owners whose applications have been denied by local governmental boards under circumstances that give rise to claims of a denial of due process or equal protection. *E.g., Eichenlaub v. Township of Indiana,* 385 F.3d 274, 285 (3d Cir. 2004); *Greenbriar Village L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1263 (11th Cir. 2003); *Harlen Assocs. v. Incorporated Village of Mineola,* 273 F.3d 484, 498-503 (2d Cir. 2001); *Crider v. Board of County Comm'rs of County of Boulder,* 246 F.3d 1285, 1289-90 (10th Cir.), *cert. denied,* 534 U.S. 890 (2001). The Congress is, of course, presumed to have been aware of this precedent. *E.g., Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988) ("[w]e generally presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts") (citation omitted). That presumption leads to two conclusions neither of which is helpful to the City and the NLC: that the Congress saw nothing incongruous about allowing Section 1983 relief to be sought by an aggrieved landowner in a zoning dispute, and that the Congress recognized that the admittedly stringent burden imposed upon a landowner to make a claim for denial of due process or equal protection should not be imposed upon a wireless operator who has wrongfully been denied a permit by a local governmental board.

commonplace to infer, from their inclusion in Section 332(c)(7)(B)(v), that the Congress sought thereby silently to import an entire body of state zoning law into the federal statute.

Both the City and the NLC offer perfervid visions of municipal devastation if the TCA is construed to allow Section 1983 claims to be brought on Section 332(c)(7) judicial review. They suggest that "thousands of local governments" will either suffer fiscal losses and be unable to spend appropriately on essential services or will surrender their authority to consider citizens' interests on wireless facility applications. NLC Brief at 21-23. The City invokes the menacing image of giant corporations raiding small towns' coffers to execute on "staggering" damage awards. Brief for Petitioners at 31. These dramatic stances are perhaps better suited to a Congressional committee hearing than they are to legal arguments on a question of statutory construction.

But the City itself recognizes that, at the present time, more than 90 percent of cellular tower applications are approved by local governments, usually within 60 days. *Id.* at 32 n.10. Allowing those applicants whose applications are wrongfully denied to seek damages and fees under Sections 1983 and 1988 will hardly ruin municipalities across the country. But taking away Section 1983 remedies will most surely embolden irresponsible local governments to act just as the City did on Mr. Kay's application. When an applicant must spend untold thousands of dollars to obtain that which the TCA guarantees, because a local government has acted in violation of Section 332(c)(7)(B)'s commands, the Congress cannot have intended that ordinary remedies available under federal law should be denied. There is

certainly nothing in Section 332(c)(7)(B) that supports such a draconian result, and nothing in the construction arguments offered by the City that would warrant it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 12, 2004 AND FILED JULY 13, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 02-3922-DSF(RZx)

JAMES A. KAY, JR, JAMES A. KAY, JR. dba LUCKY'S TWO WAY RADIO, COMMUNICATIONS RELAY CORPORATION, a California corporation,

Plaintiffs and Petitioners,

vs.

CITY OF RANCHO PALOS VERDES, a Municipality, CITY OF RANCHO PALOS VERDES PLANNING COMMISSION and its members, FRANK LYON, LARRY CLARK, JON CARTWRIGHT, THOMAS LONG, CRAIG MUELLER, THEODORE PAULSON, and DONALD VANNORSDALL; CITY OF RANCHO PALOS VERDES CITY COUNCIL and its members, JOHN MCTAGGART, DOUGLAS STERN, PETER GARDINER, BARBARA A. FERRARO, and DOUGLAS STERN,

Defendants and Respondents.

Appendix A

OPINION AND ORDER AFTER COURT TRIAL

I. INTRODUCTION

Petitioner James A. Kay ("Kay")[1] seeks rulings from this Court in what he has described as three general areas: (1) whether the Conditional Use Permit decision should be vacated for lack of substantial evidence; (2) whether the Respondents' actions violated his constitutional rights; and (3) whether the Respondents' new antenna ordinance is invalid.

A. *The CUP Decision*

Kay seeks an order vacating a Conditional Use Permit ("CUP") decision adopted by Respondents, City of Rancho Palos Verdes, et al. (the "City") in alleged violation of the Telecommunications Act of 1996 ("TCA"), and a writ of mandate requiring the City to permit Kay to operate commercially using an existing amateur antenna structure. Kay is licensed by the Federal Communications Commission ("FCC") for both amateur and commercial operations, and the antenna structure is capable of transmitting and receiving both amateur and commercial radio frequencies.

The question presented by Kay is whether the City can bar Kay from using a lawful amateur antenna structure where the only difference between amateur operations and the proposed commercial operations is the radio frequency

1. Kay sues on his own behalf and "dba Lucky's Two Way Radio." Communications Relay Corporation, an entity about which this Court has received no information, is also named as a Plaintiff.

Appendix A

utilized. Kay relies almost exclusively on the unpublished decision of another judge of this Court, which vacated a CUP decision in what Kay contends is an almost identical case: *Abrams v. City of Rancho Palos Verdes*, CV 01-9071-SVW (Order dated and filed January 9, 2002) ("*Abrams*").[2]

B. *The Claimed Violations of Kay's Constitutional Rights*

Kay also contends the City violated his constitutional rights. He asks this court to "delve into the administrative record, and beyond, to see for itself the animosity, bias and sometimes outrageous abuse of power by City Planning Commissioners and Council Members." Kay admits the CUP decision "naturally contains few express statements of bias, discrimination or improper motives, elements required to prove Kay's other claims." Kay's Opening Brief at 2. In order to establish his claims, Kay sets forth what he contends are "some of the more egregious acts and comments of the City," asking the Court to conclude "that the City falsely accused Kay of lying, abhorred Kay and his antenna structure, and openly used the CUP process to hold Kay hostage to the City's often absurd, and in some cases unconstitutional, demands (e.g., forcing him to rent his property)." Kay's Opening Brief at 3.

2. Though this Court (unlike the Ninth Circuit) has no local rule prohibiting the citation of unpublished decisions, none is necessary, as district court opinions have no binding effect.

C. *Validity of Ordinance 374U and the New Antenna Regulations*

Finally, Kay contends that Urgency Ordinance 374U ("374U"), passed March 11, 2002, is invalid and violated numerous statutory and constitutional rights because its retroactive provisions allegedly affected only Kay. He further argues 101 F.C.C. 2d 952, 50 Reg. 38, 813 (1985) ("PRB-1") preempts the City's amateur antenna regulations, as amended by 374U and applied to Kay, because the City failed reasonably to accommodate his amateur radio operations, and the regulations do not represent the minimum practicable means to accomplish the City's legitimate goals. In doing so he asks the Court to rely on expert testimony given after the decision was made. Both Kay's expert and the City's expert agreed that limiting Kay to two antennas would not be a reasonable accommodation. 374U, however, allows an applicant to request additional antennas, and the City agrees Kay would be allowed at least five. City's Trial Brief at 46.

D. *The Trial*

The TCA provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof . . . may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The parties agreed to a Court trial in the administrative record as supplemented by expert testimony[3]

3. The Court initially permitted expert testimony as to certain issues. The Court did not rely, however, on any of the proffered testimony in reaching its decision.

which was held May 11, 2004. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the following constitutes this Court's findings of fact and conclusions of law.

II. FACTS

A. *Events Preceding Approval of the Five Mast Antenna for Amateur Use*

In 1994 Kay purchased a two-story, single-family residence at 26708 Indian Peak Road in the City of Rancho Palos Verdes. AR 3:66:792 [lines 11-12].[4] The neighborhood is single-family residential. AR 1:30:115. It is undisputed that either Kay nor anyone else has lived at the property since Kay purchased it. *See* AR 3:66:792 [lines 18-24]. When purchased, the Property had two rooftop antennas. AR 3:66:792 [lines 12-14]. Kay contends he used the antennas for amateur purposes, while the City contends he also used them for commercial purposes.

On December 7, 1994, Kay wrote a letter to the FCC authorizing use of commercial frequencies for which he was licensed, including 852.9625 MHz, at a base station at his property in Rancho Palos Verdes and at the Getty Museum Center. AR 4:76:1182. Kay contends he "forgot" about this letter. *Id.* at 1164.

In January 1997, the City sent Kay a notice of violation relating to the use of his rooftop antennas for commercial

4. References to the certified administrative record are indicated by "AR volume no.:tab no.:page no."

purposes without a CUP. AR 2:56:432 [lines 25-28]. Kay denied any commercial use. AR 2:56:433 [line 9].

In April 1998, Kay installed in an upstairs bedroom antennas for commercial use. AR 2:56:433 [line 20] - 434 [line 2]. Kay contends in his trial brief that he believed the operation of interior antennas was permissible without approval because they were "located in the upstairs master bedroom, out of public view, and had no effect on surrounding properties." Kay's Opening Brief at 8.[5] Kay asserts the indoor antennas were connected to their own transmitter and the rooftop antennas remained connected to their own amateur band radio facilities, i.e., they were separate communications facilities. AR 3:66:793-94 [20-28].

By August 1998, Kay had installed three additional antennas on his roof, for total of five rooftop antennas.[6] On August 5, 1998, Kay filed an application with the City for approval of the "existing antenna array" on the roof for *non-commercial* purposes. *See* AR 1:30:114 [first paragraph]. Staff approved Kay's application on October 22, 1998. *See* AR 1:30:114 [first paragraph]. On November 4, 1998, before the 15-day appeal period was to expire, the City Council adopted Urgency Ordinance No. 341U, placing a moratorium on the processing of all antenna applications,

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5. Though the brief cites to Kay's declaration for support, the declaration does not contain such an assertion.

6. It is not clear when these antennas were first erected. Kay contends that he replaced the original antennas with the five mast structure at issue "shortly" after purchasing the house. Kay's Opening Brief at 7.

including Kay's. AR 2:43:376 [¶¶ 1 and 2]. Kay suggests he was the only person who had had his Site Plan approved and was simply waiting for it to become final. The City contends one or two other applications also were stayed by the moratorium. Fox Depo., City's Trial Brief, Ex. B, at 71:15-18.

On March 16, 1999, the City adopted Ordinance No. 345, amending its amateur and commercial antenna regulations. On April 16, 1999, the moratorium was lifted and the new regulations went into effect. The ordinance clarified the definition of "antenna support structure" as a vertical structure. Rancho Palos Verdes Municipal Code ("RPVMC") § 17.96.120. The ordinance also created a category of amateur antennas exempt from the City's permitting requirements, specifically: "[o]ne (1) building mounted antenna assembly which does not exceed twelve feet (12) in height . . . and which contains radiating elements, each of which does not exceed six (6) feet in length." RPVMC § 17.76.020(C)(3)(c)(ii). The term "antenna assembly" was defined in the ordinance as "the totality of equipment used to support reception by or transmission from an antenna. It includes the antenna(s), . . . antenna support structure(s), and any radiating elements. . . ." RPVMC § 17.96.087. Thus, the ordinance exempted from City regulation one rooftop mounted vertical antenna support structure not exceeding twelve feet in height with horizontal radiating elements not exceeding six feet in length.

At some point before June 2001, Kay mounted a *horizontal* antenna support structure from which his five antennas would extend. *See* AR 1:2:3 [project description]; AR 1:36:210 and 212. The Code at the time also provided

that two amateur antenna support structures were allowed per lot. RPVMC § 17.76.020(C)(1)(a).

Kay contended that because his antenna support structure was horizontal, he could add as many vertical poles as possible as long as they did not exceed twelve feet in height. *See* AR 1:34:208. Because Kay had attached five vertical poles to his horizontal antenna assembly before Ordinance No. 345 was adopted in March 1999, the City notified Kay on July 7, 1999 that he was "technically correct" that those five vertical poles, if used only for amateur purposes, were exempt from the City's permitting requirements. AR 2:56:438.

B. *Kay's CUP Application and the Planning Commission Actions*

On June 21, 2001, Kay applied for a CUP ("CUP 230") to use his existing rooftop amateur antenna structure for commercial purposes. AR 1:2:3-40.

The initial Staff Report from Senior Planner Fox ("Fox") to the Planning Commission, dated October 23, 2001, presented proposed findings and recommended that CUP 230 be conditionally approved. AR 5:89:1386-1394. The "Conclusion" of the Report states: "Based on the discussion presented above, Staff believes that all of the required findings for the approval of the proposed project can be made. In addition, Staff believes that the conditional approval of the proposed project is consistent with the City's Wireless Communications Antenna Development Guidelines and the Telecommunications Act of 1996. Therefore, Staff

recommends adoption of P.C. Resolution No. 2001-__, conditionally approving Conditional Use Permit No. 230." AR 1:30:125.

At the October 23, 2001 Planning Commission meeting, the commissioners, based on information in the Staff Report, concluded that Kay had lied about his commercial use of the antennas. *E.g.*, AR 1:32:195.

On November 7, 2001 Kay hand-delivered a letter to Fox referencing "Conditional Use Permit No. 230 and Environmental Assessment No. 744 - 26708 Indian Peak Road." The letter attaches "corrected project plans" which Kay asserted had been corrected "to accurately reflect the project as it was originally described on the site plan, and as it currently exists on the project site."[7] The letter further states: "It is our understanding that the 20 existing antenna elements are permitted by right, and that this correction will not materially change the nature of the project as originally proposed, which requests to convert the 20 existing roof-mounted antennas to be used for commercial purposes." AR 1:33:205.

The November 13 Staff Report again recommended that Kay be permitted to use his five mast antenna structure for commercial purposes, while maintaining the position that commercial operations were conducted at the property. AR 1:37:217. The report also notes the addition of some antenna masts. The City planners resubmitted a draft resolution granting Kay's CUP application for the five mast

7. Kay admitted, Kay's Opening Brief at 35, that Kay's actions in erecting the additional masts were "provocative."

structure, but added a new condition (condition No. 12) that Kay remove the later added antenna masts. AR 5:90:1403.

At the November 13, 2001 Planning Commission meeting Fox advised the commission that the five mast structure had been permitted for non-commercial use, and again recommended approval of the CUP. AR 1:39:231-32. City Attorney Lynch advised of a potential problem under the Telecommunications Act and PRB-1. AR 2:42:358.

On November 15, 2001, the Planning Commission issued Resolution 2001-43, "A Resolution of the Planning Commission of the City of Rancho Palos Verdes Approving Conditional Use Permit No. 230, Thereby Approving the Commercial Use of Interior Antennae and Related Support Structures and Equipment on the Site of a Single-Family Residence Located at 26708 Indian Peak road in the *Grandview* Community" (the "PC Resolution"). The PC Resolution addresses only the five mast structure.[8] AR 2:43:378-379. Though framed as an "approval," Kay correctly notes that the PC Resolution effectively denied commercial use of his *outdoor* antennas and required him to remove three of the previously approved "amateur use" antennas from his roof as a condition of being permitted to use his interior antennas commercially. AR 2:43:379 (Finding 1 B), 384-388. The PC Resolution posed a total of 22 conditions to commercial use.[9] *Id.*

8. While Kay repeatedly impliedly suggests there was some impropriety in this failure, he has submitted nothing to suggest that he properly amended the application or otherwise was entitled to have the City consider these additional antennas.

9. Kay's contention that all conditions had to be accomplished (Cont'd)

C. *Kay's Appeal and the City Council's Actions*

Before the City Council received Kay's appeal brief, AR 2:56:416-461, the *Abrams* decision was issued. On March 11, 2002, before the Council's first full hearing on Kay's appeal, the City enacted Urgency Ordinance 374U, amending its antenna regulations. RPVMC § 17.76.020 ("374U"); AR 3:64:641-43.

At the March 19, 2002 City Council meeting Fox recommended that the five mast structure be approved. The Council continued to question Kay's credibility. AR 4:69:993.

The March 25, 2002 Memorandum from the Director of Planning recommended that the City modify the PC Resolution to permit Kay's commercial use of the five mast structure based on the City's previous indication that it was exempt from 374U, AR 4:72:1023, ¶ 1, but continued to question Kay's credibility. The Report included a section in its "finding of facts" which concluded, "Accordingly, the City Council finds that the appellant's arguments — that these additional vertical support structures and antenna are amateur antennae that previously were exempt from City regulation and that the roof-mounted antenna support structure and array has not been materially altered — to be without merit or credibility." AR 4:72:1034-35.

(Cont'd)
within 90 days, Kay's Opening Brief at 17, is incorrect. The Conditions of Approval he cites for this proposition state only that Kay must, within 90 days, confirm in writing that he has read and understood these conditions, and agrees to them — not that he has comp'eted them. AR 2:43:384.

At the March 25, 2002 City Council hearing, the City Attorney agreed with Kay's assertions that transmissions with Getty had not been activated. There was, however, some form of agreement between Kay and Getty. AR 4:75:1129.

On April 16, 2002, the City Council issued Resolution 2002-27, "A resolution of the City Council of the City of Rancho Palos Verdes Approving Conditional Use Permit No. 230, Thereby Approving the Commercial Use of Interior Antennae and Related Support Structures and Equipment on the Site of a Single-Family Residence Located at 26708 Indian Peak Road in the Grandview Community (the "Council Resolution"). AR 5:84:1329-1344.

III. ANALYSIS

A. *The Telecommunications Act*

When enacting the TCA, Congress unquestionably intended to preserve the traditional local control over land use regulations. 47 U.S.C. § 332(c)(7)(A) provides: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." Nearly every case addressing claims similar to Kay's has found in favor of the government agency denying the request. Indeed, the only authority Kay was able to cite in support of his position was *Abrams*, which Kay must, and does, admit is not binding, and which the City contends was based on different facts in any event.

Kay asks this Court to find that the decision to deny commercial use of a pre-existing amateur antenna structure was not supported by substantial evidence as required by 47 U.S.C. § 332(c)(7)(B)(iii).[10] He does not contend that his antenna structure is aesthetically pleasing, or even that it conforms to the City's present regulations. He contends only that the City cannot justifiably raise the issue of aesthetics now, when Kay's only request is to change the frequency of his transmissions from an already existing lawful structure. The Court agrees.

1. *Burden of Proof*

Circuit courts addressing this issue have thus far been consistent in their determination that the burden is on the applicant to show that the local government's decision is not supported by substantial evidence. *E.g., Voicestream Minneapolis v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003); *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 63 (1st Cir. 2001). The Ninth Circuit as not yet addressed the issue. The only district court in California to resolve the issue in a reported decision has also held that the burden rests with the party challenging the local decision. *See MetroPCS, Inc. v. City and County of San Francisco*, 259 F. Supp. 2d 1004, 1009-1010 (N.D. Cal. 2003). This Court sees no reason to depart from this substantial and persuasive body of authority. Therefore, the

10. As the Court finds in favor of Kay on this issue, it declines to decide whether the City also "unreasonably discriminate[d] among providers of functionally equivalent services" in violation of the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I).

Court concludes that Kay bears the burden of establishing that the Council's resolution is not "supported by substantial evidence contained in a written record."

2. *The "Substantial Evidence" Standard of Review*

In the context of the TCA, "[t]he 'substantial evidence' standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact. Judicial review under this standard . . . is narrow." *Second Generation Props. L.P. v. Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002) (citation omitted). "The substantial evidence test is highly deferential to the local board." *Id.* "The City's decision will be considered supported by substantial evidence if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *MetroPCS*, 259 F. Supp. 2d at 1010, citing *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir. 2002). This standard requires "more than a scintilla of evidence but less than a preponderance" *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164 (S.D. Cal. 2000) (citation omitted). "The court must review the entire record as a whole in making its determination, including all evidence unfavorable to the agency's position." *Id.* (citation omitted). "If any one ground provided by the City is supported by substantial evidence, the [City's decision] is proper." *MetroPCS*, 59 F. Supp. 2d at 1010. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Second Generation Properties*, 313 F.3d at 627 (citation omitted).

In evaluating the City's decision here, "the [City's local] zoning laws govern the weight to be given the evidence." *MetroPCS*, 259 F. Supp. 2d at 1010 (citation omitted). "The City's interpretation of its own zoning laws 'is entitled to great weight and should be respected by the court unless it is clearly erroneous or authorized.'" *Id.*, citing *Carson Harbor Village, Ltd. v. City of Carson*, 70 Cal. App. 4th 281, 290 (1999).

3. *The Council Resolution Is Not Supported by Substantial Evidence*

Kay's claim for violation of the TCA (and for a writ of mandate under California Code of Civil Procedure section 1094.5) depends on Kay's ability to prove that the Council Resolution was not supported by substantial evidence. Though it is unusual to consider this issue in the context of a municipal action "approving" a CUP with conditions rather than denying the CUP altogether, the City has suggested no reason that the analysis should be substantively different. Therefore the Court simply considers whether the Council Resolution, as issued, is supported by "substantial evidence contained in a written record."[11]

Kay contends that there is no adverse impact associated with operating on commercial frequencies using existing amateur antenna structures, and thus no substantial evidence

11. As alluded to previously, Kay sought to provide additional evidence by way of expert testimony, and the City objected. The Court admitted the expert testimony, but did not find it necessary or appropriate to rely on that testimony in reaching its decision.

to support any decision barring such use. The City contends: "Kay's use of his rooftop antennas for commercial purposes *long before* he applied in 2001 for a CUP is critical to determining whether the City properly conditioned the CUP on the removal of three of the five antennas. . . . Had the City known that Kay was really using the antennas for commercial purposes from the outset . . . the City would have required Kay to apply for a CUP before erecting those antennas. Thus, the City's requirement here that Kay remove three of his five antennas is *no different than if Kay had originally applied to erect five antennas for commercial use, and the City permitted only two*." City's Trial Brief at 21. Thus, the City does not dispute that Kay's five mast antenna structure was approved for amateur use before Kay filed his CUP application.[12] It simply contends that it should be placed, for purposes of this Court's analysis, in the position it would have been in if it had known at the time of Kay's original application, that he intended to use the five antennas for commercial purposes.

But the City provides no legal support for this position. Even if the Court were to assume that Kay lied — or that the City's belief that he lied was reasonable — that does not, *a priori*, suggest that the City can retract its prior approval of the five mast structure. Neither body of law — that relating

12. Kay contends that his actual CUP application was for use of a 20-mast structure, including 15 masts erected after June 1, 2001. Kay has not established this to the Court's satisfaction. In any event, the City did not consider these additional masts in its analysis and "findings of fact" when it reviewed Kay's application. *See, e.g.*, AR 2:43:378-79 [Section 1(A)]. The Court therefore addresses the approved five mast structure.

to amateur use of antennas or that relating to commercial use — even suggests that veracity of the applicant is a relevant factor. The Court has not been cited to any authority concerning PRB-1, which applies to applications for amateur use, that discusses the veracity of the applicant or the impact of the applicant's actual or potential intention to use the antennas for commercial purposes in the future. Therefore, it is not clear why the City's decision would have been different.

While the Court can understand the City's concern that, in the wake of *Abrams*, it now must consider applications for amateur antenna structures even more carefully, there is no basis to conclude that the Court can retroactively imprint that concern onto **this** decision — at least as it relates to the five mast structure.

The City urges that the Court "decline Kay's invitation to follow *Abrams* without acknowledging the factual distinctions that compel a different result." City's Trial Brief at 21. The Court agrees that there are significant differences between this case and *Abrams*, and fully recognizes that *Abrams* is not binding. In *Abrams*, for example, Judge Wilson accepted the City's contention that 12.5 feet of Abrams' antenna violated the original permit. Here, the City claims it would never have allowed Kay to put *five* commercial antennas on his roof had it known of his true purpose (in other words he only received a permit for those five because he intended to use them for amateur purposes). The findings in *Abrams* regarding the alleged improper use, however, show a stark contrast to the facts here. Regarding

the City's contention that it could require Abrams to reduce the size of his antenna structure, Judge Wilson found:

> The first reason indicated above, that the use contradicts the original purpose of [the] 1990 permit, is immaterial. The record does not indicate that the denial of the CUP would require Plaintiff to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community.

Abrams at 10:25 to 11:3.

Here, the City is taking precisely the position that it apparently *failed* to take in *Abrams* — that it *would* require Kay to limit his (visible) use of antennas to the amateur use previously allowed, i.e., two antennas.

The Court is not persuaded, however, by the City's argument that "[t]he real question is whether the City originally could have permitted erection of only two rooftop antennas for commercial purposes." City's Trial Brief at 21. The Court instead chooses to do what it believes the law compels — decide this case based on the record before it, i.e., the administrative record before the City Council in August 2001.

The Court now turns to that administrative record to determine the reasons for the Council Resolution to the extent that it requires Kay to remove three of his five antennas — and to determine whether those reasons are supported by "substantial evidence contained in a written record."

The City groups the findings supporting the Council Resolution into three categories. First, the City contends that its "findings were designed largely to retain the residential character of the surrounding single-family neighborhood and to reserve aesthetics atop the Palos Verdes peninsula." City's Trial Brief at 17. The City correctly notes that "[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes." *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999). Moreover, "aesthetic harmony is a prominent goal underlying almost every such code." *Id.* The City of Ranchos Palos Verdes is no exception. The City cites to code provisions designed to address aesthetics. *E.g.*, *RPVMC* § 17.76.020(A)(11)(a)(ii). With these concerns in mind the Council Resolution contains the following findings: (1) there was inadequate foliage to "screen any antenna support structures or antennae on the roof of the structure from view from any surrounding residences . . . ," thus requiring reduction to two masts to "maintain the appearance of the structure as a single-family residence, and to integrate the commercial use into the residential neighborhood," AR 5:84:1332 [Section 1B]; (2) "conversion of the existing antennae to commercial use constitutes intensification of the use that benefits the applicant financially but . . . does not offset the visual impacts of the antenna array upon the surrounding neighborhood," AR 5:84:1333 [Section 1D]; (3) the conditions imposed are meant to prevent the commercial use of the property from exacerbating the substandard condition of the residence, and ensure use consistent with the General Plan, AR 5:84:1334 [Section 1F]; (4) the conditions imposed are meant to protect the "health, safety and general welfare," AR 5:84:1334-35

[Section 1H]; and (5) the removal of the antennas will "balance the aesthetic impacts of the antennae upon the neighborhood with the applicant's financial benefit." AR 5:84:1336 [Section 4].

The Court declines to adopt Kay's suggestion that the City's obvious disdain for the proliferation of antennas detracts from the reasonableness of its decision. Indeed, all aesthetic requirements arise from the relevant agency's dislike — or that of its constituents — for certain visual features, and preference for others. That the City Council members heed the reasonable desires of residents to maintain certain standards establishes that they are acting as voters expect elected public officials to act. This should not result in blanket condemnation by the Courts. It is only proper for a court to intervene when the City impermissibly crosses the boundaries established by the TCA. *See* 47 U.S.C. § 332(c)(7)(A) and (B).

The Court also declines Kay's invitation to conclude that the "real reason" the Council denied his request was due to hostility toward Kay; to punish him for "fighting City Hall"; to punish him for adding 15 additional masts to his structure,[13] to punish him for referring to his litigation with the City as "cheap theater" in a press interview, etc. While these factors most certainly did not endear Kay to his neighbors or the

13. Kay claims that after he realized the City was intent on preventing his commercial operations, he decided to "maximize his amateur station and experiment with it," but the City then responded by changing the law and making it retroactive to render those masts illegal, after-the-fact. The Court does not accept Kay's characterization in light of the record before it.

Council members, as discussed below, the Court believes there was "substantial evidence contained in a written record" of valid aesthetic reasons for denying Kay's request *that would have been sufficient had Kay not already received permission to have the five mast structure*. As noted above, however, the Court believes it must consider the record as a whole as it stood at the time Kay applied for CUP 230 -- that is, with the approval of the five mast structure as it then existed. When the Court considers that Kay's five mast structure had, by the time of the Council's decision, been lawfully in place for at least three years,[14] the City's purported concerns are "too little, too late." What might have justified denial of either a commercial or amateur application in 1998 cannot justify denial when that same structure has been accepted, however grudgingly, by the community for at least three years. (As one planning commissioner noted, there are other methods of code enforcement that may be available to address these matters.) These reasons are not sufficient *today* to justify removal of three antennas.

Kay contends that the foliage (and the degree to which it does or does not address the City's aesthetic concerns) is the same regardless of whether the lawful five mast structure transmits and receives amateur or commercial frequencies. Kay is correct. There is no indication in the record that the foliage existing at the time Kay's five mast structure was found to be exempt had died or otherwise changed. In the absence of such evidence, the record does not contain "substantial evidence" to support the Council's finding. (Even

14. As previously indicated, it is not clear when the five mast structure was erected, but it was no fewer than three years before the Council Resolution and two years before the PC Resolution.

with such evidence, the more appropriate remedy might have been a condition that it be replaced considering that the five mast structure was exempt.)

There is no indication, either in the record or the City's Trial Brief, of what the Council meant by "intensification of use" -- at least as it would relate to any visual impact different from that existing in June 1999, when the City confirmed that Kay's five mast structure was exempt. This finding is vague and unsupported.

There is no evidence concerning which specific "health, safety and welfare" concerns would mandate removing three of five antennas, especially when the record evidences no concerns on these subjects raised during the previous several years. To the extent that those concerns relate merely to changing frequencies, the City apparently concedes its inability to regulate in this area. See AR 5:84:1337-38 [Section 5C].

As to "balancing the aesthetic impact with financial gain," there is no explanation in the record as to what legitimate concerns the City might have been addressing, or how the balancing might be accomplished. For example, it's not clear whether more antennas would be allowed if Kay could make a *lot* of money from them (and therefore his loss would be great), or if he could make only a small amount from them (and therefore his loss would be so minimal that the City's concerns about aesthetics would weigh in the City's favor). In any event, considering that the aesthetics, such as they were, had already been in place for years, there is no particular logic in allowing the City to change the rules *as to*

existing lawful antennas simply because Kay now might profit from those antennas. No evidence supports this finding.

The City's next category of findings relates to Kay's use of the residence as an "antenna facility." City's Trial Brief at 18. This concern is closely tied with the City's third category: that Kay lied when he stated that he did not use his exterior antennas for commercial use. City's Trial Brief at 19. Notably, Section 2 of the Council Resolution focuses on Kay's commercial use and lack of credibility. AR 5:84:1335 [Section 2]. Despite the amount of space devoted to this issue in the briefs -- and Kay's vehement protestations of honesty, supported mostly by his own declarations, this Court is unable to conclude whether Kay has always been open and honest" with the City with regard to when his commercial use began. As indicated previously, however, the Court cannot find any legal support for denying Kay's application, even if he had intentionally misled the City on this issue.

The Court therefore finds the Council Resolution requiring Kay to remove three of his five existing antennas is not supported by "substantial evidence contained in a written record."

B. The Improper CUP Decision Warrants A Writ of Mandate Under California Code of Civil Procedure § 1094.5.

Review of planning commission proceedings regarding a conditional use permit is appropriate under Code of Civil Procedure section 1094.5. *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546 (1972). As with the TCA, the standard of

review is "whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision . . . in light of the whole record." *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514-15 (1974).

Therefore, for the reasons described above, a writ of mandate shall issue requiring that the City permit commercial use of Kay's five mast antenna structure subject to appropriate conditions.

C. Kay Has Not Established That His Constitutional Rights Have Been Violated.

1. Kay Has Not Proved a Violation of His Right to Substantive Due Process

Assuming *arguendo* that Kay has a constitutional basis for his claim,[15] Kay is correct that substantive due process may be violated where a municipal body acts arbitrarily or irrationally in making its decisions. *See Airtouch Cellular*, 83 F. Supp. 2d at 1170 (the principle of substantive due

15. The City objects to Kay's substantive due process claim on the grounds that any argument that the City Council retaliated against him for exercising his First Amendment rights preempts a substantive due process claim. As the Court rejects Kay's substantive due process claim on other grounds, it need not reach the issue.

For the same reason, the Court need not determine whether Kay seeks constitutional redress for property infringement generally, for which there is a constitutionally protected right, or only for his CUP permit for commercial antennas, for which the City argues there is not.

process assures property owners of the right to be free from arbitrary or irrational zoning actions); *Omnipoint Communications, Inc. v. Penn Forest Tp.*, 42 F. Supp. 2d 493, 508 (M.D. Pa. 1999) (substantive due process violation may occur if the zoning authorities are "motivated by 'bias, bad faith, improper motive, racial animus, or the existence of artisan political or personal reasons'").

Kay points to comments of City planning commissioners, the City Attorney and City Council members that allegedly demonstrate a lack of fairness.

Kay first points to Planning Commissioner Long's statements: "I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to hell and let them sue us." AR 2:42:358. City Attorney Lynch responded: "Which undoubtedly will happen. OK. I will be quiet now. I have said this every way I can think of." *Id.*

Commissioner Long's statement appears to be a reaction to the *Abrams* decision, which was clearly unpopular with the Commission and City Council. Commissioner Long's comment is not at all irrational in light of the potential impact of *Abrams*. While Congress made clear in the TCA that it wished to reserve to local agencies the right to make aesthetic decisions when presented with applications for commercial antenna use, 47 U.S.C. § 332(c)(7)(A), PRB-1 makes clear that governments must consider the great benefits conferred

on the public by amateur radio operators when considering their applications. PRB-1 at ¶ 10. This provision *may* allow those in the telecommunications business to avoid a certain degree of regulation by purporting to erect amateur antennas while fully intending immediately to convert them to commercial use. The proliferation of unsightly antennas[16] is limited to some degree by their non-commercial use. There simply is a limit to how many antennas (or how high an antenna) one residence needs (or would want) for amateur use. If one is able to make money from antennas, however -- so much money that it makes economic sense to buy a home in a well-to-do residential neighborhood to be used simply as a structure on which to place antennas -- "the sky is the limit," so to speak. It was not irrational for the commissioners to fear that Abrams, coupled with the willingness of applicants to "misrepresent" their intentions (or legitimately change their minds), would effectively defeat Congress' recognized intention to preserve the ability of local governments to address the aesthetic concerns of the vast majority of their citizens.

Elsewhere, Kay objects to Council Member Gardiner's comment in response to the arguments of one of Kay's representatives: "I've heard enough snake oil." AR 4:69:1003. It's not clear from the record to what this referred, but it may have been the obviously troublesome position taken by Kay's counsel that Kay could place "10, 20, 30" or a virtually unlimited number of amateur use antennas on his roof so long as each was under 12 feet tall. AR 4:69:1001.

16. The Court assumes there's no real dispute that such antennas are rarely considered a positive addition to a residential neighborhood.

Later, Gardiner discusses the concept of "substantial evidence" and that it is expected that legislators will consider the views of their constituents, and states: "I think we have a right under the Telecommunications Act to simply say take the stuff off the exterior. Now if you want to put inside [sic], that's your choice. If you want to find greener pastures. That's your choice, but I believe we can say take the antennas off the exterior of the house . . . . So I would say that we have a basis, a reasonable basis, for saying take all the antennas off the roof." AR 4:75:1139. This was not a totally unreasonable interpretation of the TCA in light of section 7(A) and the substantial circuit authority upholding the ability of local government to regulate aesthetics, and does not prove irrationality, bias, or punitive intent.

Finally, Council Member Clark stated: "Well, I'll tell you the difficulty I have with that is, this is a residential community. It's a residentially zoned community and quite frankly, this ruse by Mr. Kay with the City doesn't fly with me one iota. And by the way, I'm not impressed with his comments to the press, that he considers this cheap theater . . . . If you think that impresses the Council, it doesn't." AR 4:75:1126. Mayor Pro Tern Stern follows this remark with: "We are. We are, Larry." *Id.*

Council Member Clark frankly stated his appropriate concerns for maintaining the residential nature of the community. These are precisely the concerns relegated to local governments under the TCA and the case law interpreting it. Clearly, Council Member Clark did not believe Kay had been honest with the City. The Council's concerns with Kay's veracity *in this regard* have a substantial basis in

fact.[17] The Court concludes, based on the record, that the belief of the commissioners and council members that Kay had intended to use his antennas for commercial purposes as early as the date on which he applied for amateur use was reasonable. Their concerns in that regard were not irrational, nor did they arise from bias. The concerns arose from the information before the Council members. While attempting to rebut "unfounded attacks on [his] credibility, Kay made clear his long existing interest in commercial use. He has been active in the telecommunications industry since 1973. AR 4:76:1160 (Applicant James A. Kay, Jr.'s Supplemental Declaration and Exhibits in Support of Conditional Use Permit). Kay has operated telecommunications businesses since 1977. *Id.* These businesses specialize in, *inter alia*, sales of air tame for two way radio systems. He has transmission facilities throughout Southern California. *Id.* "Shortly" after purchasing the Indian Peak residence, Kay placed three additional antennas on his roof (for a total of five). Kay's Opening Brief at 7. In December 1994 he signed a letter that would have authorized the Getty Trust to broadcast from his residence. AR 4:76:1182. Kay leased space on his indoor antennas to at least two businesses. AR 4:76:1161. At the time he was applying for CUP 230, Kay had "a large number of *pending* commercial applications with the FCC." *Id.* Most of the applications sought permission to broadcast from the

17. The Court distinguishes the question of whether Kay was truthful concerning the date on which he began commercial operations, and whether those operations were inside the house or outside, from the question of whether Kay misrepresented his intentions when he stated he intended to use the additional antennas for amateur purposes. It is this latter subject that Long and Clark appear to be addressing.

Indian Peak property as well as other locations. *Id.* He admitted he might want to use the Indian Peak property for those licenses. *Id.* Kay contends he purchased the Indian Peak property as a "second residence" and has been fixing it up, but it is unquestioned that no one has lived at the residence since its purchase by Kay. Kay's representative admitted at the November 13, 2001 public hearing that Kay wanted all 20 antennas to remain on the roof for commercial use. AR 1:39:236-37.

With respect to the comments of City Council members,[18] Kay bases his due process claim on allegations unsupported by the record. For example, Kay baldly alleges that City officials "allowed Kay's legal acts and statements to provoke them into abusing their powers, to the point that they ignored advice from experienced City planners and their own City Attorney (and Judge Wilson's ruling *Abrams*) in their drive to retaliate against Kay." Kay's Opening Brief at 36-37. However, the other statements by City Council members suggest an ongoing debate over the merits of Kay's application rather than any arbitrary or irrational animus toward Kay. City Council Member Gardiner attempted to determine what the City Council's obligations were under

18. Kay has cited only isolated statements of City officials to substantiate his claim of due process violations. This Court agrees that the City Council's decision on Kay's CUP application, not the Planning Commission's decision, is under review. Regardless of whether planning commissioners are agents of the City, the comments of Commissioner Long, or any other commissioner, are irrelevant to the question of whether the City Council's decision-making process violated Kay's right to substantive due process. Even if the Court considered all the comments identified by Kay, the result would be the same.

the TCA, AR 4:75:1139, while Council Member Clark voiced concerns about maintaining the residential character of the neighborhood. AR 4:75:1126. Instead of arbitrary action, the City Council members' comments evidence serious deliberation as they discuss reasons Kay's permit application should or should not be granted. Surely, the City Council has a right to debate the merits of Kay's permit application without running afoul of substantive due process.

Elsewhere, Kay insists that the City commissioners and Council members decided Kay was a liar, based on false assumptions about alleged Getty Trust operations, and thereafter treated him with contempt, precluding any chance of a fair assessment of his antenna application. *See* AR 4:75:1129. The City Council did indeed debate whether Kay had a contract with the Getty Trust. AR 4:75 1129. Nothing in the record, however, rises to the level of treating him with "contempt" or establishes that council members formed any irrational hostility toward him based on these assertions. The City continues to contend that, in November 1995, the FCC issued the Getty Trust a license to use Kay's antennas for business purposes. It further contends the Getty Trust was licensed to use antennas on Kay's property and began using those antennas on November 27, 1995 to transmit on frequencies licensed to use antennas for commercial mobile radio services, including the 852.9625 MHz frequency which Kay expressly authorized. Kay initially submitted a sworn declaration to the City saying that "The Getty Trust obtained an FCC license to transmit on commercial frequencies from my location without my knowledge or permission.

AR 2:56:434 [lines 6-7].[19] Kay opined that "Getty must simply have been told by a "radio industry professional . . . of [his] home and radio transmitters located in Rancho Palos Verdes." *Id.* Later, Kay's counsel admitted to the City Council that Kay gave Getty permission to list Kay's property as a site on Getty's application for a commercial license. AR 5:83:1305. Indeed, the December 7, 1994 letter establishes that Kay had business discussions with Getty that could potentially have resulted in a lucrative business arrangement. The Court is skeptical, to say the least, that Kay, who clearly was interested in making money from the use of his antennas, would have forgotten he had entered into such an agreement with such a well-known entity as the Getty Trust. Indeed, it is not clear to this Court even now, after extensive briefing and discussion by both parties, precisely what commercial arrangements Kay actually had with Getty at any particular point in time. The City was justifiably skeptical about Kay's veracity concerning his actual and intended use of the property.

Moreover, as the City notes, other statements by these same Council members demonstrate fairness and professionalism toward Kay. On the last night of the public hearing, for example, Council Member Gardiner stated the matter should be continued until the City Council has had "a fair chance" to look at Kay's submissions in order for the

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19. The City contends that Kay's alleged lies about commercial use of the antennas is dispositive. The Court disagrees. The Court concludes there was "substantial evidence" in the record to suggest that Kay had lied. Therefore, if the City's position were legally correct, the Court would uphold the CUP. (The Court is not making a finding as to whether Kay actually did lie about this issue.)

decision-making process "to be absolutely fair." AR 5:83:1309. Elsewhere, Council Member Clark stated that his goal was to permit Kay to use the two antennas on his roof as he sought fit, while maintaining the residential character of the neighborhood. AR 5:83:1319. Mayor Pro Tem Stern stated that while he was troubled by Kay's candor, his decision "turns on other factors" as well. AR 5:83:1316. As further evidence of the extent to which City officials respected Kay's rights, Kay's own representative thanked the City's planning staff and praised them as "consummate professionals." AR 4:69:1003. While Kay dismisses these comments as "perfunctory professionalism" that does not waive Kay's right to object to the City's "arbitrary and irrational acts," Reply at 15, the Court sees them as some evidence that Kay's substantive due process rights were not violated. Kay simply has not proven to this Court that the Council's actions rose to the level of a substantive due process violation.

2. The City Did Not Violate the Equal Protection Clause.

The Equal Protection Clause mandates: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Kay admits he is not a member of a suspect class. Therefore, as long as the City has a "rational basis" for creating a classification, . . . the law passes the equal protection test." *Watson v. Proctor*, 161 F.3d 593, 599 (9th Cir. 1998).

Kay's first equal protection claim is that he was treated differently from Abrams, who was allegedly similarly situated. As the City notes, it was vehemently opposed to granting Abrams commercial use of his antenna. The Court doubts an equal protection claim can be based on an involuntary, court ordered action. In any event, the Court finds Kay and Abrams are not sufficiently similarly situated to compel a finding of an equal protection violation. Kay himself argues that his situation is different from Abrams'. He, contends: "Kay's [antenna] arguably had *less* of a visual impact than Abrams' . . . ." The Court agrees there is a difference in visual impact - and therefore, a difference between Abrams' situation and Kay's. Whether the impact is greater or less is not for Kay -- or for this Court -- to decide. As is by now obvious, Kay and Abrams think in terms of antenna *use*, while the City properly considers aesthetics. A five (or 20) mast structure is not aesthetically equivalent to a 52.5 foot tower. More importantly, the City notes that Abrams apparently lives in his residence while Kay does not. As discussed previously, there is substantial evidence supporting the City's conclusion that Kay purchased his residence simply to use it as an unoccupied base for his antenna business.

Kay has not proven that he is similarly situated to Abrams.

3. Ordinance 374U Does Not Constitute A Bill Of Attainder Or Ex Post Facto Law; Its Passage Does Not Violate Kay's Equal Protection Rights.

The parties agree 374U was a reaction to, and designed to address, Judge Wilson's ruling in *Abrams*.[20] Specifically, 374U prohibits the installation of more than one vertical mast per amateur rooftop antenna structure. AR 3:64:641. Kay argues that the City adopted 374U as an "urgency" measure to affect the appeal pending on Kay's CUP application, which was then scheduled to be heard in a few days. AR 3:66:737. Had the City adopted the amendment in the ordinary course of business, 374U would not have applied to Kay's CUP application. Kay contends at, assuming the ruling in *Abrams* applied to Kay, the City "arguably would have been forced" to grant Kay's application as to his entire 20 mast antenna structure (not just the five mast antenna structure), subject to reasonable conditions. Kay's Opening Brief at 39.

Although the new "urgency ordinance" banned the installation of all multiple antenna mast structures without first obtaining a permit, it "grandfathered" in all existing antenna structures – *except* those erected after June 1, 2001. AR :64:0641 [Section 3]. Based on sworn testimony of both Senior Planner Fox and Director of Planning Rojas, Kay is the *only* Rancho Palos Verdes homeowner who erected or modified his antenna structure after that date, i.e., *both* the "urgency" nature of 374U and the retroactive provision were

20. Though Kay refers to the ordinance as "eviscerating" the ruling, there is nothing inherently wrong in the City passing an ordinance in an attempt to address the impact of a court's ruling.

directed *solely* at Kay. (Fox Depo., Kay's Opening Brief, Exh. C, at 91:14 to 92:15; Rojas Depo., Kay's Opening Brief, Exh. E, at 119:7 to 120:7.)

a. Bill of Attainder

The Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. ART. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002), *quoting Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). "A statute that singles out individuals or groups by targeting their property may . . . be a bill of attainder." *Id.* at 672.

"Three key features brand a statute a bill of attainder: that the statute (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial." *Id.* at 668. "Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder." *Id.* at 669. Only the first two factors need be discussed here.

The Ninth Circuit has established four non-exclusive guideposts "to aid in determining whether legislation singles out a person or class within the meaning of the Bill of Attainder Clause." *Id.* Courts must evaluate (1) whether the statute or provision explicitly names the individual or class, or instead describes the affected population in terms of general applicability; (2) whether the identity of the individual or class was easily ascertainable when the

legislation was passed; (3) whether the legislation defines the individual or class by past conduct that operates only as a designation of particular persons; and (4) whether the past conduct defining the affected individual consists of irrevocable acts committed by them. *Id.* No single factor is dispositive. *Id.*

Clearly 374U does not name Kay, but the class of persons affected by it would be "easily ascertainable": it is those City residents who erected certain types of rooftop antennas after June 1, 2001. It appears Kay was the only Rancho Palos Verdes homeowner in this group (though there are others who might have been affected if an earlier date had been chosen). The ordinance was passed in response to the *Abrams* decision and was deemed "urgent" specifically because of Kay's pending application. The City acknowledges that 374U was intended to apply to Kay's additional antennas. *See* AR 3:64:642; City's Trial Brief at 11-12.

The "past conduct" factor supports a finding of specificity when the date in the challenged statute targets an individual on the basis of a past act that others had not committed as of the date the statute was passed. *Id.* Courts may also consider the future potential of the statute to "encompass a larger class than the individual or group allegedly targeted." *Id.* That 374U will apply to every future homeowner wishing to erect amateur antennas detracts from Kay's specificity argument. *SeaRiver*, 309 F.3d at 671. Indeed, although Kay apparently was the only person then affected by 374U, its clear purpose was to address the very concerns the city had raised before Judge Wilson, and that Commissioner Long identified, AR 2:42:358, i.e., that

individuals would falsely claim to want antennas for amateur use as a means to avoid restrictions or denials of commercial permit applications.

Finally, the Court must consider whether the challenged statute "defines the specific class of persons affected by the 'irreversible acts committed by them.'" *SeaRiver*, 309 F.3d at 671 (internal citation and quotations omitted). Clearly no *irreversible* acts are involved here. Though no single factor is dispositive, the Court finds the "reversibility" of the conduct at issue to be a compelling factor favoring a finding of non-specificity. The Court need not decide the issue, however, as it concludes 374U does not inflict punishment.

A statute must inflict punishment in order to constitute a bill of attainder. *SeaRiver*, 309 F.3d at 673. In determining whether a statute inflicts punishment, courts must evaluate: (i) whether the challenged statute fails within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. *Id.* Courts may also consider "whether less burdensome alternatives would have achieved the same non-punitive purpose." *Id.* statute need not satisfy all of these factors to constitute a bill of attainder. *Id.*

Traditionally, bills of attainder sentenced the targeted individual to death, imprisonment, banishment, punitive confiscation of property, or otherwise erected a bar against employment or participation in specified vocations. *Id.* Kay argues that 374U falls within the historical meaning of

legislative punishment because it represents a punitive confiscation of property. Reply at 17. The City contends (1) economic loss does not fall within the historical meaning of legislative punishment and (2) 374U's limit on the number of amateur antennas cannot by definition amount to punitive confiscation. City's Trial Brief at 38-39. The Court agrees with the City.

Because the Ordinance does not provide for actual confiscation, Kay must necessarily rely on a theory that equates confiscation with economic loss. But, economic loss occurs only when Kay does exactly what the City accuses him of doing: constructing antennas allegedly for amateur use, while fully intending to use them for commercial purposes. If the Court takes Kay at his word, there can be no economic loss. In any event economic loss alone is not coterminous with punitive confiscation of property. *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992); *see also Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 692 (D. N.J.) (economic punishment does not fall within the historical meaning of legislative punishment).

Next, the Court inquires whether the challenged statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes." *SeaRiver*, 309 F.3d at 674. Even if the statute singles out an individual on the basis of irreversible past conduct, it cannot be a bill of attainder if it furthers a non-punitive legislative purpose. *Id*. Kay alleges that 374U does not further a non-punitive legislative purpose because it contains a retroactivity clause that applies only to one

individual. Reply at 18. The City claims that the non-punitive purpose of 374U is (1) to reduce visual blight that could occur if individuals erect an unlimited number of amateur antennas and (2) to control the potential explosion of commercial antennas in light of the Abrams decision. City's Trial Brief at 40.

Although 374U singles Kay out on the basis of past conduct, a quick review of photographs of the Indian Peak Residence, AR 1:36:212, establishes the non-punitive legislative purpose of avoiding visual blight. Aesthetic concerns lie at the root of zoning policy, *see Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989) ("preservation of the character and integrity of single-family neighborhoods" is a "legitimate purpose of planning and zoning"), and Kay does not dispute that a number of his neighbors complained that the Property was unsightly and did not conform with the residential character of the neighborhood. (Kay does contend, however, that he was in the process of fixing it up.) Indeed, if Kay had not had the five mast structure on his roof for several years -- lawfully -- this Court would have found that the City's aesthetic concerns were justified even as to those. Moreover, rather than targeting Kay's property only, 374U addressed the prospective risk of additional homeowners erecting antennas. In short, this factor supports a finding that 374U furthers a non-punitive legislative purpose.

One characteristic of a punitive statute is a legislative record that evinces an intent to punish. *SeaRiver*, 309 F.3d at 676. Courts must determine whether the legislative record is probative of non-punitive intentions or instead evidences an

intention "to pander to an inflamed popular constituency" and "assume the mantle of judge -- or worse still, lynch mob." *Id.* (citation omitted). Departure from established legislative procedure may indicate an improper purpose. *Id.*

Kay claims that numerous hostile remarks directed toward him and his counsel demonstrate a legislative intent to punish. Kay's Opening Brief at 41; Reply at 18. For the reasons addressed in the discussion of Kay's substantive due process claim, the Court disagrees. While the administrative record reflects a certain degree of hostility toward persons who claim to be interested in amateur use in order to obtain permission to erect antennas in residential neighborhoods, on balance, the record indicates that 374U was enacted with the non-punitive intention of furthering legitimate planning goals, rather than the intention of punishing Kay. Similarly, although Kay describes the conditions imposed as punitive, the conditions arguably reflect a legitimate attempt to ensure that Kay's long vacant property will in future be maintained in keeping with the residential character of the neighborhood. Thus, the conditions cannot be fairly described as a mere attempt to "pander to an inflamed popular constituency." *SeaRiver*, 309 F.3d at 676. In short, any hostility toward Kay reflected in the legislative record is not conclusive evidence of punitive intent.

In determining whether a legislature sought to inflict punishment on an individual, courts also find it useful to "inquire into the existence of less burdensome alternatives by which [the agency] could have achieved its legitimate nonpunitive objectives." *Id.* at 677, *quoting Nixon*, 433 U.S. at 482. Here the City Council certainly could have chosen a

date other than June 1, 2001 for application of the retroactivity provision, or otherwise increased the number of permissible antennas. Nevertheless, the City Council's decision appears to be rational and commensurate with its legitimate non-punitive goals. Therefore, the Court will "decline to assume the mantle of the legislature in determining the date that a statute must take effect, or in framing and quantifying the class that the legislation may permissibly affect." *Id.* at 678.

Because 374U does not inflict punishment, the Court finds it is not a bill of attainder.

b. Ex Post Facto

To determine whether a statute is an ex post facto law, courts must first "ascertain whether the legislature meant the statute to establish civil proceedings" *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citation and quotation marks omitted). If the legislature intended to impose punishment, then the inquiry is finished. *Id.* If, however, the legislature intended to "enact a regulatory scheme that is civil and nonpunitive," courts must "further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Id.* (citation and quotation marks omitted). Because courts must ordinarily defer to the legislature's stated intent, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (citation and quotation marks omitted).

Appendix A

To determine whether a statutory scheme is civil or criminal, courts "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* at 93 (citation and quotation marks omitted). Courts should begin by examining the statute's text and structure, but "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Id.* at 94.

The City alleges that 374U is not an ex post facto law because the City Council's intention was to enact a civil non-punitive statute. City's Trial Brief at 43. Kay does not specifically address this issue. See Kay's Opening Brief at 42; Reply at 18-19.

The Rancho Palos Verdes City Council expressed its legislative intent in the text of 374U itself. *See* AR 3:64:642. The Council noted that the Abrams decision established "judicial precedent that could be used to allow the current exemption for certain amateur antennae to be used by individuals seeking to make commercial use of those antennae and profit thereby by adding more antennae and support structures on residential structures to the detriment of the surrounding residential neighborhoods and the public health, safety and welfare." *Id.* The ordinance explains that "[t]o avoid the substantial delay . . . and the corresponding adverse impacts to the public health, safety and welfare of the City's residents and the general public, . . . it is necessary for this ordinance to become effective immediately." *Id.* The text also suggests that retroactive application would ensure

Appendix A

"that the current exemption cannot be misused by individuals seeking to make commercial use of amateur antennae, especially since one such application currently is pending before the City . . . ." *Id.* Thus, the text of 374U reflects the intent to deal rationally with a public policy concern, and "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Smith*, 538 U.S. at 93 (citation omitted).

Kay attempts to cast doubt on the non-punitive character of 374U by pointing out that any violation of the municipal code may be punished by criminal prosecution. Kay's Opening Brief at 42. Specifically, Section 1.08.010 of the RPVMC provides: "[a]ny person violating the Code is guilty of a misdemeanor, unless the violation or failure to comply is expressly stated by [the] Code to be an infraction or is subsequently prosecuted as an infraction in the discretion of the city attorney . . . ." 374U itself, however, does not provide for any procedures associated with the criminal process, nor does it establish penalties for noncompliance. *See* AR 3:64:641. The (remote) possibility that Kay could be criminally prosecuted for failure .o comply does not render 374U a criminal law. *See Smith*, 538 U.S. at 96 ("Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.").

In analyzing the effect of a challenged statute, courts examine whether the sanction: (i) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only on a finding of scienter; (4) promotes the traditional aims of punishment (retribution

and deterrence); (5) applies to behavior which is already a crime; (6) has a rational connection to a non-punitive purpose; or (7) is excessive with respect to this purpose. *Id.* at 97; *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). These factors are "neither exhaustive nor dispositive." *Id.* (citation omitted).

Misdemeanor charges for violation of local zoning ordinances have not historically been regarded as punishment. *See SeaRiver*, 309 F.3d at 673 (historical punishments include death, imprisonment, banishment, punitive confiscation of property, and bars to employment). In any event, it is clear from the record that Kay has regularly been in violation of various ordinances of the Rancho Palos Verdes Municipal Code. There is no suggestion that Kay or anyone else has ever had such a violation treated as a misdemeanor.

The statutory scheme does not impose any affirmative disability or restraint. *See Smith*, 538 U.S. at 99-100 ("If the disability or restraint is minor and indirect, its effects are unlikely to be punitive."). Although the possibility of criminal prosecution may prevent City residents from violating 374U, 374U does not reasonably have the effect of promoting the traditional aims of punishment. *See Smith*, 538 U.S. at 102. The ordinance does not prohibit behavior that is already a crime or otherwise require a finding of scienter. *See* AR 3:64:641. Most significantly, however, 374U has a rational connection to a non-punitive purpose, namely the prevention of the proliferation of antennas in the City of Rancho Palos Verdes. *See* AR 3:64:642; *see also Smith*, 538 U.S. at 102-03 (a rational connection to a nonpunitive purpose is the most significant factor for determination that a statute's effects

are non-punitive). Finally, possible misdemeanor charges for violation do not constitute an excessive punishment in light of 374U's nonpunitive goals. *See* AR 3:64:642.

In passing 374U, the intent of the Rancho Palos Verdes Council appears to have been to create a civil, non-punitive regime. Kay has failed to show by the "clearest proof" that the statute's effect is so punitive as to negate the City Council's intent to establish a civil regulatory scheme. 374U, therefore, does not violate the Ex Post Facto Clause of the United States Constitution.

c. Equal Rights

In this permutation of his equal protection argument Kay contends that he is not the only homeowner whose rooftop antenna structure fails to meet the requirements of 374U. As the retroactive aspect of 374U applies to his structure (because of its effective date), he claims he is treated differently from similarly situated homeowners. To establish his claim he refers only to photographs attached to the report of his expert, H. Clark Bell. This photos are inadmissible, and in any event would not prove his claim. Bell does not authenticate the photos other than to say that they were provided during discovery. Although his report mentions them, it is for another point -- not to establish that the homeowners are similarly situated to Kay or that their antennas do not conform to 374u or were in place before June 2001. Indeed there is nothing in the record from which the Court could conclude these homeowners were similarly situated. The photos are so poor the Court cannot even be sure that some of the homes depicted even have radio antennas, much less similar, non-conforming ones.

Where the plaintiff is not a member of a suspect class, a statute will not violate equal protection if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *SeaRiver*, 390 F.3d at 679, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). After viewing Kay's evidence (the photos provided by the City), the Court perceived an aesthetic difference among antenna structures. Even if Kay had established that 374U did not include others similarly situated, "'mere underinclusiveness is not fatal to the validity of a law' under the Fifth Amendment's guarantee of equal protection." 390 F.3d at 679 (citations omitted). In any event, that the Council "could have chosen an earlier or later effective date does not establish an equal protection violation." *Id.* at 680, *quoting United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("the fact the line might have been drawn differently at some points is a matter for legislative rather than judicial discretion").

The City has not violated the Equal Protection Clause.

d. Kay's "Taking" Claim Is Not Ripe.

The "taking" clause of the Fifth Amendment provides: "[n]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The purpose of the clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Before a challenge to an alleged taking may be brought in federal court, the claims must satisfy the ripeness requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). A challenge to an alleged regulatory taking is not ripe unless (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the claimant has sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. Thus, pursuant to the second prong of the *Williamson* test, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. If the state does not have a "reasonable, certain, and adequate provision for obtaining compensation" at the time of taking, however, the claim is instantly ripe. *Id.* at 194; *see also San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998). "A landowner who seeks to sue in federal court before seeking compensation from the state bears the burden of establishing that state remedies are inadequate." *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004) (internal quotation marks and citation omitted).

Kay appears to allege that ripeness is irrelevant because "ordinary takings cases" are not applicable to the present situation. Reply at 21. The City alleges that Kay's taking claim fails because Kay has not exhausted his state remedy for seeking just compensation. City's Trial Brief at 45.

Kay has failed to show that he pursued state administrative or judicial remedies to seek just compensation. *See* Reply at 21-22. Although Kay engaged in an extended series of dealings with the City regarding his CUP application, see Kay's Opening Brief at 9-22, Kay has not alleged that he ever sought compensation or losses resulting from conditions imposed on the CUP. *See* Reply at 21-22. Moreover, Kay has failed to prove, or even allege, that California lacks an adequate procedure for seeking just compensation. Id. For that reason, Kay's taking claim is not ripe.

5. Kay's Claim Under PRB-1 Is Premature.

PRB-1 is a Federal Communications Commission declaratory ruling, providing that "local regulations which involve placement, screening or height of antennas based on health, safety or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." *Id.* at ¶ 25 (emphasis added). PRB-1 preempts only those "local regulations that operate to preclude amateur communications . . . ." PRB-1 ¶ 24 (emphasis added). PRB-1 "promotes the federal interest in amateur radio operations rather than any individual operator's right to erect the antenna of his or her choice. *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991). PRB-1's reasonable accommodation standard requires that a municipality (i) consider a resident's antenna application, (2) make factual findings, and (3) attempt to negotiate a satisfactory compromise with the applicant. *Id.* Kay admits that the City considered his application and made

factual findings; he objects only to the City's alleged failure to negotiate a satisfactory compromise with him; Kay's Opening Brief at 45:16-19. Kay likens his situation to that of plaintiff in *Palmer v. City of Saratoga Springs*, 180 F. Supp. 2d 379, 385 (N.D.N.Y. 2001). According to Kay, the City has disregarded this third prong of the reasonable accommodation test and instead "engaged . . . in a strictly one-sided negotiation consisting of inflexible demands and the construction of hoop after hoop . . . to jump through." *Id.* In support of his contention, Kay cites the City's alleged "historical, demonstrable animosity" toward antennas in general and Kay's antennas in particular as proof that the City "would never allow a property owner to have more rooftop antennae than are exempt under section 17.76.20."[21] Kay's Opening Brief at 46:21-27.[22]

Kay's objection to the City's attitude toward antennas is premature, however, as the City has not ruled on how many

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21. Kay's argument that PRB-1 preempts this section is immaterial, as Kay has not yet applied for an amateur antenna permit.

22. Kay cites to a statement in *Abrams* and "hostility expressed by the City towards antennae in the *Abrams* case" as the sole support for his contention. But *Abrams* is a different case with different facts, most of which have not been provided to this Court. Even if the Court considers the few facts provided in the *Abrams* decision, it would establish that the City was hostile to a 52.5 foot tower in a different location. The Court declines to find the City would not act in good faith in an entirely different situation without giving the City an opportunity to act properly. The Court also notes that the testimony of the City's experts provided in support of his argument was given after this action was filed. Thus the City has not yet had an opportunity to consider that opinion.

amateur antennas Kay may have. The City never prohibited Kay's amateur-use antennas because Kay never applied for an amateur permit for the additional fifteen antennas he seeks to erect. In fact, the City specifically states in its trial brief that it would allow Kay at least five amateur antennas should Kay "avail himself of the procedures set forth . . . for seeking approval from the Planning Director or the Planning Commission depending on the height of the proposed antenna." Opposition Brief at 47. The City's Planning Director has the ability to approve amateur antennas "beyond the two exempt assemblies," so long as the proposed antenna meets specified height requirements. City's Trial Brief at 48. Kay's failure to apply for an amateur antenna permit is apparently based on his fear that the City's hostility to him and his antennas precludes fair adjudication of any application he might make.

Black letter law typically demands that an individual seeking judicial review of agency action exhaust all administrative remedies before seeking relief in a federal court. *See, e.g., Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-30 (9th Cir. 1992). In the present case, the City has explicitly prohibited Kay from erecting more than two antennas for commercial use. AR 5:84:1340-41 [condition 2]. It has not yet ruled on his amateur antennas. Kay has not exhausted his administrative remedies.

Kay's remaining arguments are thus inapposite. Kay asserts that, although the CUP demands only that Kay remove "roof-mounted antenna" but permits him to locate as many antennas inside of his house as he wishes, AR 5:84:1342 [condition 11], interior antennas are far less effective than

exterior antenna. AR 4:76:1166-67. Kay further notes that the only possible interior location is the home's master bedroom but that Kay was only permitted to broadcast commercially on the condition that the house be occupied. If, after applying for an amateur antenna permit, the five permissible roof-top amateur antenna[23] (in addition to interior antenna Kay may choose to have) do not provide Kay with reasonable accommodation for amateur purposes, he may then, and only then, appropriately pursue his case in federal court.

As the City notes, moreover, expert Richter's testimony rests on the mistaken premise that the City has already stated that Kay may have only two amateur antennas. Because this is not the case, Richter's testimony that two antennas are insufficient has no bearing on the present case. In addition, the aesthetic similarity of amateur and commercial antennas is not dispositive, as other considerations, such as the health or safety issues suggested by PRB-1, may direct the City's decision. The Court will not attempt to predict on what basis the City may make its ultimate ruling.

Of course, if the City fails reasonably to accommodate Kay's amateur antenna use, once he files an application, the City *may be* in violation of PRB-1. The Court will address that issue, if necessary, when properly presented, rather than usurp the City's permit-granting role. Indeed, PRB-1 "does not contemplate the outright invalidation of city zoning authority . . . ." *Howard*, 937 F.2d at 1380. Barring Kay's exhaustion of the remedies, his PRB-1 claim is not ripe for

23. These will now be allowed to remain in accordance with the instant order.

review. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987) (plaintiffs' taking, equal protection and due process claims were not ripe for review where "the City has not yet made a final decision regarding the property"); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988) (property owners' takings, equal protection and due process claims not ripe because the "City reached no final and authoritative determination as to how the [zoning] ordinance applied"). The Court simply cannot determine that the City has violated PRB-1 based on what it might do according to some unsubstantiated alleged grudge.

In any event, Kay's requested relief is inappropriate. He apparently attempts to bootstrap his PRB-1 argument into an order that the City approve all of his amateur antennas for **commercial** use. While that might be the legal effect, if this Court's present ruling and the *Abrams* decision are correct, that is an argument for another day with further briefing. PRB-1, by, its express terms, refers only to **amateur** antenna use and does not address **commercial** use at all. Insofar as Kay attempts to apply PRB-1 to **commercial** antenna, he misapplies the agency ruling. Insofar as Kay attempts to apply PRB-1 to **amateur** antenna, he has failed to exhaust his administrative remedies as required in order to seek relief in this Court.

D. Remedies Pursuant to 42 U.S.C. §§ 1983 and 1988

Kay asks that the Court award him damages pursuant to 42 U.S.C. § 1983 and attorney's fees pursuant to 42 U.S.C. § 1988.

The Ninth Circuit recently held that section 1983 damages are available for violations of the TCA, *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004), finding that although "the TCA contains no remedies at all," awarding section 1983 damages is more consistent with "the presumption in favor of § 1983 remedies." *Id.* at 1098. Kay may submit his request under these sections by regularly noticed motion.

V. CONCLUSION

For the reasons stated, the Court finds there was not "substantial evidence contained in a written record" to support the Council Resolution. A writ of mandate will issue compelling the City Council of the City of Rancho Palos Verdes to issue a new resolution allowing James A Kay, Jr. to use his five mast antenna structure for commercial purposes, subject to reasonable conditions. Kay may seek fees and costs in a separately noticed motion.

On all other issues the Court finds in favor of Respondents.

Kay is ordered to submit a proposed Judgment within ten days of the date of this Opinion and Order. Respondents shall have ten days to submit any objections to the proposed Judgment.

IT IS SO ORDERED.

Dated: July 12, 2004

s/ Dale S. Fischer
Dale S. Fischer
UNITED STATES DISTRICT JUDGE

APPENDIX B — EXCERPTS FROM CITY OF RANCHO PALOS VERDES PLANNING COMMISSION MEETINGS

CITY OF RANCHO PALOS VERDES
PLANNING COMMISSION
REGULAR MEETING
NOVEMBER 13, 2001
ITEM NO. 3

CHAIRMAN LYON: Okay, next item is Item Number 3.

COMMISSIONER LONG: When do we get comments from the public on non-agenda items.

CHAIRMAN LYON: Pardon?

COMMISSIONER PAULSON: Comments from the. . . .

COMMISSIONER LONG: Public on non-agenda items.

CHAIRMAN LYON: Oh we covered that already.

COMMISSIONER LONG: Oh we did already?

CHAIRMAN LYON: Yeah, yeah. There were none.

COMMISSIONER LONG: Oh okay, that was it.

COMMISSIONER PAULSON: We were moving fast in the beginning.

[Laughter]

COMMISSIONER PAULSON: You stepped out of the room . . . .

[Laughter]

COMMISSIONER LONG: I stepped out the room briefly so that's fine. Good.

CHAIRMAN LYON: Okay.

COMMISSIONER LONG: That we're done startles me.

COMMISSIONER VANNORSDALL: Never leave the room.

* * *

COMMISSIONER CARTWRIGHT: So it would seem to me that if we were to narrow our discussion to the five antennas that were up there when the application was filed, there were antennas on the second level that, we can certainly discuss what should happen to those, and then it seems to me that we need to make certain that the structure looks like and feels like a single family residence and fits in with the character of the neighborhood. These other 16 antennas that are up on the roof, as far as I'm concerned, unless there are some compelling arguments on the part of the other Commissioners, I don't see where they fit into this application. It seemed to me that that's a violation of our Development Code and they should be taken down.

COMMISSIONER LONG: I think we should probably include a fact-finding in a amended resolution saying what

John just said. I guess to start off, I mean, to maybe go through, my thought was to go through and maybe we could take it paragraph by paragraph, starting on page 3 of 9, Section 1, subparagraphs. It seems to me perhaps we should have a section A, which would be just what John just said, that we find that this application applies only to the four antennas that actually existed and were depicted in photographs in the application. Am I getting the number wrong?

CITY ATTORNEY LYNCH: There's five.

COMMISSIONER LONG: Five.

SENIOR PLANNER FOX: There were five existing.

COMMISSIONER LONG: Okay, five. The five antennas that were in the pictures depicted with the application, and that the other antennas to the extent they were existent on the property, do not fall within any exemption and are not the subject of this application. It seems to me we're going to want to modify proposed finding A, where it says there is existing foliage which screens the roof-mounted antennae from many surrounding residences. I would say, the existing foliage does not adequately screen the roof-mounted antennae from many surrounding residences in the neighborhood, and then, I would say, however, conditioning approval upon relocation of all antenna facilities, and I would add a sentence at the end of A, however, conditioning approval upon removal of all antenna facilities to the interior of the house eliminates any adverse visual impacts. Let me see.

CITY ATTORNEY LYNCH: I might suggest that you go ahead and allow the two, in that there's one that looks like a television antenna remain. Leave those two up there, because there is an exemption for two of that type of antenna.

COMMISSIONER LONG: Okay, and then maybe we should also, in the proposed amendment. . .

CITY ATTORNEY LYNCH: Put everything else inside.

COMMISSIONER LONG: . . . that John was talking about say that, other than those two, the others are not exempt, and that we're removing those.

CITY ATTORNEY LYNCH: And putting them inside, right?

COMMISSIONER LONG: Right. Okay. I would go next to, well, okay, actually C, in approving the subject use at the subject location, there will be no significant adverse effect on adjacent property or the permitted use thereof because the conditions of approval of the project will require reductions of the existing exterior antenna support structure and array. It's a part of the basis of our factual finding. And C is going to be the conditions that we're going to be imposing. It would seem appropriate to leave all of the other conditions and findings in place in C.

COMMISSIONER PAULSON: Tom, a question. I have a question first. City Attorney and staff, if we do what is being proposed on this specific one, where we're saying put everything inside other than two, under the City's current Development Code, if they want to put up antennas exterior-

wise, after we were to take such an action, strictly on the outside, based on an amateur antenna situation, do they have to come back to the City?

COMMISSIONER LONG: No they'll already have their two, that's why Carol made the modification.

* * *

CITY ATTORNEY LYNCH: I'm sure the three of us will work together.

CHAIRMAN LYON: And are we going to have it available to us before our meeting Thursday night.

CITY ATTORNEY LYNCH: Yes.

COMMISSIONER LONG: I am going to be looking to have as many conditions as we had for Longpoint.

CITY ATTORNEY LYNCH: I'm sorry.

COMMISSIONER LONG: Just kidding. As many conditions of approval as we had for Longpoint. You know, how many were there, sixty-three.

CHAIRMAN LYON: More than that.

CITY ATTORNEY LYNCH: Keep going.

COMMISSIONER LONG: One hundred.

COMMISSIONER PAULSON: It was a hundred.

COMMISSIONER LONG: When the conditions are done you can deliver both volumes of them to my office.

CITY ATTORNEY LYNCH: We can email them.

COMMISSIONER MUELLER: I think as part of those conditions took, I would like to see that thing on the roof, that pipe, disappear. I don't think that's necessary to support basically two antennas.

SENIOR PLANNER FOX: You mean the thing that looks like a big dryer vent?

COMMISSIONER MUELLER: Yes. That's to support the entire array.

* * * *

Appendix B

CITY OF RANCHO PALOS VERDES
PLANNING COMMISSION
ADJOURNED MEETING
NOVEMBER 15, 2001

Adoption of Resolution for Conditional Use Permit No. 230 and Environmental Assessment No. 744; 26708 Indian Peak Road

CHAIRMAN LYON: I guess there aren't any comments on the agenda. This evening there is one item on the agenda. Unless there is an objection, we'll approve the agenda. Are there any communications?

DIRECTOR ROJOS: Yes, I'll let Carol handle that.

CITY ATTORNEY LYNCH: We did pass out this evening a revised resolution and we provided a redline copy to the Commission where we made some additional changes today to the resolution. I have also provided a copy to the applicant's representative who is here, and if the other member of the public would like one, we also have an additional copy. So, and we passed this out before the meeting, so we would be asking the Commission to take action on the revised resolution that was passed out tonight.

CHAIRMAN LYON: Are there any questions from the Commission? OK, motion to proceed with the consent calendar items, and do we need a staff report? As far as I'm concerned, we can waive it.

Appendix B

CITY ATTORNEY LYNCH: Basically, we attempted to incorporate the directions that were given by the Commission at the meeting two nights ago.

CHAIRMAN LYON: And it's clearly stated that that's what we've got. So, let's . . .

CITY ATTORNEY LYNCH: We have two speakers.

CHAIRMAN LYON: We have two speakers. I guess the first item of business, unless there are questions . . .

CITY ATTORNEY LYNCH: You closed the public hearing. At this point, the public hearing is closed and the speakers can certainly comment on the text of the resolution, but this is not reopening consideration of the item. It's just adoption of the resolution memorializing the Commission's actions.

* * *

DIRECTOR ROJAS: Two.

CITY ATTORNEY LYNCH: Two. Which is the garage.

SENIOR PLANNER FOX: The garage would be the required parking.

CHAIRMAN LYON: I made a comment at some point that I'd like to use the word "dedicated."

COMMISSIONER LONG: No I said, yeah, I said exclusively.

CHAIRMAN LYON: Well exclusively would preclude anyone else from ever parking in the driveway.

COMMISSIONER LONG: That's right. That's. . . .

CHAIRMAN LYON: I have a problem with that.

COMMISSIONER LONG: That's what it means.

COMMISSIONER PAULSON: I don't know if you mean that, Tom.

COMMISSIONER LONG: No, actually, that is exactly what I mean. Because then they're being required to maintain two spaces for the residence, and two spaces for the service vehicles, so that at no time when the service vehicles are visiting will they ever have to park on the street.

COMMISSIONER PAULSON: You just qualified your statement. You said at no time when they are visiting. I'm concerned that when they're not visiting, you're saying somebody can't park their car there.

COMMISSIONER LONG: Well yeah, the concern I have is that someone will park their car there and. . . .

COMMISSIONER PAULSON: Then they're in violation if they park on the street.

COMMISSIONER LONG: Oh yeah, because it says, all service vehicles related to maintenance of the commercial antenna shall be parked off-street. Okay, so then no more

than two service vehicles are allowed in the same time. Two off-street parking spaces. . . .

* * *

COMMISSIONER LONG: Right.

CHAIRMAN LYON: This . . .

COMMISSIONER LONG: This approval of commercial antennas in the interior allows two exterior masts because it has restrictive conditions. In other words, it's still O.K.

CITY ATTORNEY LYNCH: I have to say, the more we talk about this, the more uncomfortable I am with it because it seems to me that in addition to the enforcement issue, we are walking into a potential argument that we are going too far under the Telecommunications Act and PRB 1 and the balance that has to go under PRB 1. I hadn't even thought about this until now. Under PRB 1, we have to use the least restrictive means possible to regulate amateur antennas. By getting into this issue, we are walking into a problem.

COMMISSIONER LONG: Well, but if he is going to sue us on the grounds that he wants to really use the property for more amateur antennas. Fine, so be it. Then we will find if this use maybe really is amateur. I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to

hell and let them sue us.

[LAUGHTER]

CITY ATTORNEY LYNCH: Which undoubtedly will happen. O.K. I will be quiet now. I have said this every way I can think of, so . . . .

CHAIRMAN LYON: Well, Carol, . . .

COMMISSIONER MUELLER: I'm glad you here to hear that statement, myself.

CHAIRMAN LYON: Carol, you raised a good point, and are we doing anything in this paragraph that affects your position in that regard?

COMMISSIONER PAULSON: She was not addressing this paragraph. She was addressing the decision, the basic decision.

* * *

CHAIRMAN LYON: O.K. Then why are we not telling Mr. Kay to locate his antennas up on Abrams' property?

CITY ATTORNEY LYNCH: Because, right now, Mr. Abrams doesn't have a CUP to operate commercially.

COMMISSIONER LONG: Right. That's not an available site. And it won't be when we get a favorable termination of his lawsuit. Hopefully.

CITY ATTORNEY LYNCH: Hopefully.

COMMISSION LONG: But my comment on 9 was almost going to be, I think B is too vague, "negotiate in good faith." I would say, "agree to co-location as reasonably requested by the City," if we could do that.

CITY ATTORNEY LYNCH: Well, the trouble with that is that there is always an issue about separation and distances in order to avoid interference and if they show that they can't reasonably accommodate the other user, we can't then require them to do something that interferes with their own transmissions.

COMMISSIONER LONG: Well, but that's why I say, "as reasonable requested by the City." In other words, the thought is "good faith" is kind of a different standard. "Good faith," they could say, well, yeah, maybe they could have located an antenna here, but, you know, we want a lot of money and they weren't willing to pay it.

COMMISSIONER PAULSON: Which is part of the argument for [unintelligible].

COMMISSIONER LONG: Yes. Exactly. And I would kind of like to modify 9B to say that they will, instead of saying "negotiate in good faith for shared use by third parties," "agree to whatever shared used by third parties is requested by the City."

CITY ATTORNEY LYNCH: I don't like that.

COMMISSIONER LONG: "Is reasonably requested by the City."

CHAIRMAN LYON: Well, we are quoting directly from our Code using these words, and I think that we shouldn't deviate from that.

COMMISSIONER LONG: Then, I will defer.

* * *

PAULSON: See, that's my concern, I don't know whether we have the right to dictate, even in this situation, much of the appearance of the roof.

CHAIRMAN LYON: I don't think we need to . . .

COMMISSIONER PAULSON: We don't necessarily tell people to put drapes, curtains, blinds . . . .

COMMISSIONER LONG: Well, you say we don't require it in vacant houses. Do we require, is there anything in the Building Code. This is not going to be a vacant house.

CITY ATTORNEY LYNCH: No. There's no requirement about . . .

COMMISSIONER LONG: . . . even when they reside. O.K. Then fine. We are requiring whatever we are requiring for a residential house.

CITY ATTORNEY LYNCH: O.K. So we take out C. All right.

CHAIRMAN LYON: I guess I understand the reason why B is in there, really for the same reason A is in there, but we don't really require landscaping in anybody's front yard.

COMMISSIONER PAULSON: Well, that's true, but there is _____.

CHAIRMAN LYON: We do, oh, good. I didn't know.

COMMISSIONER LONG: We are going to go look at your front yard. Don't look at mine. I'm having it relandscaped right now.

CHAIRMAN LYON: Number 19, I suggest, do we say 90 days? I think that's too stringent. I would suggest 6 months. Even that is difficult, because we are requiring him to have either himself or some other person occupying that property within 6 months.

COMMISSIONER PAULSON: Well the planner, Frank, for the applicant says they will have somebody in the house.

COMMISSIONER LONG: They didn't ask for six months to do. I think three months is ample.

CHAIRMAN LYON: What if he wanted to rent?

COMMISSIONER LONG: Well, then he can rent. I mean, I can't imagine some . . .

CHAIRMAN LYON: You can put an add in the paper and put it in . . .

COMMISSIONER LONG: Given the current rental market, I don't think he'll have any trouble.

COMMISSIONER PAULSON: Well, why does he have to it in 90 days if he [unintelligible].

COMMISSIONER LONG: And show that he's . . .

CHAIRMAN LYON: My question is, is it unreasonable? That's my only concern. If it is not unreasonable, then I am O.K. with it.

SENIOR PLANNER FOX: Their attorney did state last night on the record that the addition will be done in six weeks.

COMMISSIONER LONG: When did he say that?

SENIOR PLANNER FOX: Tuesday night, on the record, whatever night it was.

CHAIRMAN LYON: And, the second and third line "shall be occupied by the applicant." I don't think so. I think we want to say "owner."

SENIOR PLANNER FOX: Well, the owner is the applicant.

CITY ATTORNEY LYNCH: The owner is the applicant.

CHAIRMAN LYON: Yes. But sometimes, the applicant is let's see, an architect, or property manager and, you know, . . .

CITY ATTORNEY LYNCH: We can say owner.

SENIOR PLANNER FOX: We can say owner.

CHAIRMAN LYON: Just so it is clear.

SENIOR PLANNER FOX: Yes.

CITY ATTORNEY LYNCH: Or someone chosen by the owner. Let's change it then to owner.

* * * *

(16)

No. 03-1601

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL.,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) ..... *passim*

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Native Village of Venetie IRA Council v. State of Alaska, 155 F.3d 1150 (9th Cir. 1998) 15

Nextel Partners Inc. v. Kingston Township, 286 F.3d 687 (3d Cir. 2002) 14

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Smith v. Robinson, 468 U.S. 992 (1984) .....*passim*

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law, the Minority Media and Telecommunications Council, the National Asian Pacific American Legal Consortium, the National Partnership for Women & Families, the National Association for the Advancement of Colored People and the Puerto Rican Legal Defense and Education Fund, Inc. represent people of color, women, individuals with disabilities and other disadvantaged populations under various federal civil rights statutes. Many of these statutes have direct causes of action, while others are implied. These statutes have differing remedial provisions guided by the unique legislative purpose of each law.

Through precedents like *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) and *Wright v. Roanoake Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the Court has articulated an analysis for determining whether a federal statute has a "comprehensive" remedial scheme that is incompatible with remedies under § 1983. This analysis by necessity is statute specific, focusing on the remedies provided by the statute and Congress' intent in providing those remedies. Any departure from this well established

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

framework in favor of a simplistic rule of thumb as advocated by the Solicitor General would have a direct and limiting effect on the *amici's* ability to continue to press claims on behalf of its disadvantaged constituencies. Accordingly, the following *amici* offer their views on this important issue.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, a past Attorney General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country challenging discrimination in virtually all aspects of American life. The Lawyers' Committee has a keen interest in proper interpretation of statutory law so as not to unduly limit the availability of remedies for plaintiffs seeking to redress violations of federal civil rights laws, and has most recently offered its views to the Court in the following cases: *Commissioner v. Banks/ Banaitis,* ___ U.S. ___, 125 S. Ct. 28 (2004); *Pennsylvania State Police v. Suders,* ___ U.S. ___, 124 S. Ct. 2342 (June 14, 2004) and *Jones v. R.R. Donnelley and Sons Co.,* ___ U.S. ___, 124 S. Ct. 1836 (May 3, 2004).

The Minority Media and Telecommunications Council ("MMTC") is a national nonprofit membership corporation, founded in 1986 and both incorporated and domiciled in the District of Columbia. MMTC is dedicated to promoting equal opportunity and eliminating all vestiges of segregation in the media and telecommunications industries regulated by the FCC. MMTC represents other organizations in FCC rulemaking proceedings, operates a media brokerage, trains law students, and conducts conferences and seminars. Its members include media and telecom employees and managers and entrepreneurs.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its affiliates have a long-standing interest in civil rights issues that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

Founded in 1971, the National Partnership for Women and Families, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for all and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and the federal circuit courts of appeals.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1983 to insure that all litigants have available the substantive and financial means to vindicate federal constitutional and statutory rights. *Felder v. Casey*, 487 U.S. 131, 139 (1988) (providing a means for individuals whose federal constitutional or statutory rights are violated to recover damages or equitable relief is the central purpose of § 1983). Section 1983

presumptively makes damages and attorneys' fees available to any litigant who demonstrates deprivation of an enforceable federal Constitutional or statutory right, absent Congress' express or implicit intent to preclude § 1983 remedies. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984) (legislative history and Court's jurisprudence demonstrate that § 1988 (implemented through § 1983) is a broad grant of authority for award of attorneys' fees to plaintiffs seeking to enforce federal statutory rights – a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust) (citations omitted). *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (legislative history indicates that § 1983 should be "liberally and beneficently construed"). Section 1983 has become a crucial weapon in the fight to protect Americans from arbitrary deprivation of civil and other statutory rights. Without the damages and attorneys' fees authorized by § 1983, many poor and middle-class persons could not afford to assert the rights provided to them by federal law against even the most egregious violations. Enforcement of many statutory rights would also be so economically unfeasible even for the non-indigent as to leave their availability subject to the whim of government officials. As *amici's* experience and decades of published judicial decisions demonstrate, § 1983 is an indispensable tool in the fight against arbitrary or malicious deprivation of our rights as Americans.

Ignoring the presumption in favor of § 1983 claims, the Solicitor General of the United States, in its *amicus* brief filed on behalf of the government, invites the Court to announce two bright-line rules: (1) that *any* statutory provision for individual judicial review makes a remedial scheme so "comprehensive" as to demonstrate Congress'

implicit intent to preclude § 1983 remedies, and, (2) that the absence of a specific provision for attorneys' fees automatically renders a statute incompatible with § 1983 because § 1983 does provide for attorneys' fees. The first of these conclusions contradicts this Court's well-developed jurisprudence, which requires a statute-by-statute analysis of individual remedial schemes to determine whether they are sufficiently comprehensive to rebut the presumption that § 1983 is available. The second ignores precedent, Congressional intent and logic by arguing that § 1983, a statute whose very purpose is to encourage claims by providing for attorneys fees, can only be invoked in connection with a statute that already provides for attorney's fees.

Neither of the government's propositions needs to be addressed to resolve the question actually before the Court – whether the particular statute at issue, the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (the "TCA"), incorporates a remedial scheme sufficiently comprehensive to demonstrate Congress' implicit intent to override the presumption in favor of § 1983 relief. There is no need for the Court to abandon its well-established jurisprudence requiring a case-by-case analysis of an individual statute in order to determine whether the TCA's remedial scheme is sufficiently comprehensive to preclude a § 1983 claim.[2]

[2] *Amici* will not address the issue of whether the TCA does in fact include a sufficiently comprehensive scheme to preclude a § 1983 action because such an explication is unnecessary. The parties will no doubt explore that question in detail. *Amici's* primary interest herein is in urging the Court to preserve its traditional statute-by-statute analysis rather than accepting the Solictor's invitation to adopt radical new bright-line rules that would apply to future § 1983 claims and substantially narrow the scope of that statute.

The consequences of adopting the government's position on the disadvantaged constituencies represented by *amici* would be substantial. For these reasons, *amici* urge the Court to decline the government's invitation to abandon its long-established jurisprudence requiring statute-by-statute analysis in favor of over broad bright-line rules that would eviscerate § 1983.

ARGUMENT

I. Provision For Judicial Review Does Not In Itself Constitute A Comprehensive Remedial Scheme Proving That Congress Intended To Override The Presumption In Favor Of Access To Section 1983

A. The Government Argues That Provision For Judicial Review Is Dispositive

The government states that "§ 332(c)(7)(B)(v) does provide a private judicial remedy to ensure that States and local governments live up to their obligations. Accordingly, it is sufficiently comprehensive to preclude a § 1983 action. . . ." (Brief for the United States As *Amicus Curiae* Supporting Petitioners ("Brf.") at 20. It also states that "Congress' creation of a judicial cause of action such as § 332(c)(7)(B)(v) to enforce a federal right, with its express and necessarily implied incidents under federal law, is 'sufficiently comprehensive' to indicate a congressional intent to preclude a § 1983 action to enforce the same right." Brf. at 17 In other words, identification of *any* provision for access to the courts meets the "substantial

burden" of rebutting the presumption against a finding that Congress implicitly intended to preclude a § 1983 claim. This conclusion simply does not comport with the Court's well established jurisprudence on the subject.

B. The Court's Jurisprudence Places A Heavy Burden On A Party Attempting To Show That A Remedial Scheme Is Sufficiently Comprehensive To Rebut The Presumption Of Access To Section 1983

The Court through a series of detailed decisions has articulated a much more complex analysis than the simplistic rule of thumb suggested by the government to determine whether Congress implicitly intended to foreclose a § 1983 claim. As the government admits, "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." Brf. at 13 (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 284 (2002)). *See also Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (demonstration of an enforceable federal statutory right creates a rebuttable presumption of enforceability via § 1983). The burden of demonstrating that Congress has foreclosed a § 1983 cause of action rests on the party claiming this preclusion. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (holding that burden to demonstrate that Congress has precluded a § 1983 action rests with the party opposing the claim, once the other party has established an enforceable federal right).

As the Court's jurisprudence clearly establishes, such a showing can be made only where the statute on which the § 1983 claim is predicated includes a *comprehensive*

remedial scheme that is incompatible with § 1983. *Blessing*, 520 U.S. at 341 (presumption may be rebutted where comprehensive remedial scheme is incompatible with individual enforcement, thus demonstrating Congress' implicit intent to foreclose recourse to § 1983). The Court has described this as a "difficult showing" to make. *Suter v. Artist M.*, 503 U.S. 347, 360 n.11 (1992) (litigants seeking to establish such intent must make the difficult showing that allowing § 1983 actions to go forward would be inconsistent with Congress' carefully tailored scheme); *Wright*, 479 U.S. at 423-24 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right."); *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (presumption of availability of § 1983 where enforceable federal right violated can be overcome only in exceptional circumstances).

C. The Court Has Looked To A Variety Of Factors In Determining Whether A Particular Scheme Is "Comprehensive" And Has Never Laid Down A Bright-Line Rule

As the government acknowledges, the Court has only twice found a statutory remedial scheme sufficiently comprehensive to warrant a conclusion that § 1983 is unavailable. Brf. at 14 (citing *Sea Clammers*, 453 U.S. at 13 and *Smith*, 468 U.S. at 1010-12). The government repeatedly suggests that these decisions rested solely on the fact that the statutes at issue contained provisions for individual judicial review. Brf. at 14-15, 17. The government is mistaken.

The government's characterization of these cases contradicts the Court's own interpretation. In *Blessing*, the Court examined its prior decisions in *Sea Clammers* and *Smith*. The Court explained the multiple factors it relied on in determining that in those two cases the very difficult showing of an implicit intent to displace § 1983 had been made. The Court began by pointing out that *Sea Clammers*:

> focused on the 'unusually elaborate enforcement provisions' of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. . . . We emphasized that several provisions of the Act authorized private persons to initiate enforcement action. . . . We found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two-citizen suit provisions."

Blessing, 520 U.S. at 347 (citations omitted).

Regarding *Smith v. Robinson* the Court stated that because the Education of the Handicapped Act "permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review. . . . Congress could not possibly have wanted parents to skip these procedures and go straight to court by way of § 1983, since that would have 'rendered superfluous most of the detailed procedural protections *outlined in the statute*.'" *Id.* (emphasis added) (citations omitted).

As the Court recognized in *Blessing*, both *Sea Clammers* and *Smith* relied on a number of factors in determining that the two "unusually elaborate" enforcement schemes at issue were so comprehensive as to compel a conclusion that Congress implicitly intended to foreclose resort to § 1983. These opinions did not default to a simplistic rule of thumb that the plaintiff had access to judicial review and leave it at that. Rather, the Court did a true analysis before determining that the remedial schemes before it were "comprehensive." *Amici* believe the Court should continue this type of analysis on a statute-by-statute basis.

The government cites three more cases – *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987); *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) and *Blessing v. Freestone*, 520 U.S. 329 (1997) – in support of its proposed new rule. Brf. at 18-19. It first claims *Wright* held that because the statute before it did not explicitly provide for judicial review, it could not be sufficiently comprehensive to evidence Congressional intent to foreclose § 1983. *Id.* Even if this were true, it would be irrelevant. That failure to provide for review might preclude a finding of comprehensiveness does not mean that providing for review compels a finding of comprehensiveness. The second proposition simply does not follow from the first. *Wright* did not reach its conclusion "because" of the statute's lack of a judicial review provision, as the government suggests. The *Wright* opinion analyzed a claim that because Congress had vested exclusive enforcement authority in a particular agency (the department of Housing and Urban Development), private § 1983 relief was unavailable. The *Wright* opinion points out that the agency did not consider itself

to have exclusive enforcement authority. *Wright*, 479 U.S. at 426-27. The Court observed that the agency itself assumed the availability of private lawsuits. *Id.* It therefore rejected the assertion that § 1983 was foreclosed. *Id.* at 427-28. While *Wright* did point out that provision for judicial review is evidence of Congressional intent to displace § 1983, it certainly did not state that provision for judicial review is in itself *proof* of such intent.

The government's reference to *Wilder* is no more availing. *Wilder* did point out that *Sea Clammers* and *Smith* had cited the availability of judicial review as among the many factors to be considered in determining whether Congress intended to foreclose resort to § 1983. It did not, however, rely solely on the availability of judicial review in reaching its conclusion, let alone announce a *per se* rule. Indeed, *Wilder* specifically noted that in *Sea Clammers* the Court had relied on the "comprehensive enforcement scheme" at issue in that case – including agency enforcement powers, provision for citizen suits, and provision for criminal penalties. *Wilder*, 496 U.S. at 521. *Wilder* also observed that in *Smith*, the Court held that it was the "elaborate administrative scheme" that manifested Congress' desire to foreclose resort to § 1983. *Id.* In other words, *Wilder* applied rather than supplanted the analytical framework the Court discussed in *Sea Clammers*.

Finally, the government asserts that in *Blessing*, the Court rejected a claim that the statute before it was sufficiently comprehensive to preclude § 1983 remedies, solely because the statute lacked a provision for judicial review. Brf. at 19. Even if this were true, it would not prove the converse – that inclusion of any provision for relief compels a conclusion of comprehensiveness.

In fact, *Blessing* undercuts the government's position. As discussed above, *Blessing* demonstrates that the Court considers a variety of well-defined factors in determining comprehensiveness. In *Blessing*, the Court not only examined its prior holdings in *Sea Clammers* and *Smith* and discussed the factors considered in those opinions, but also cited the fact that the statute it was examining lacked provisions for access to administrative review. And the Court also cited the relatively weak enforcement powers of the state official charged with administering the relevant aid program. *Blessing*, 520 U.S. at 348. *Blessing* did not pronounce a bright-line rule that lack of a judicial review provision in itself precludes a finding of "comprehensiveness" – let alone a rule that access to judicial review automatically compels such a finding.

The Court has never announced or relied on any kind of bright-line rule regarding provision of judicial review in determining whether a remedial scheme is sufficiently comprehensive to rebut the presumption that § 1983 claims are available. Instead, it has looked to a variety of factors to determine whether a *comprehensive* remedial scheme exists. None of the cases cited by the government suggest otherwise. As resort to a new rule is neither necessary nor supported by case law, the Court should reject the government's interpretation.[3]

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[3] The government also asserts that provision for judicial review will "not always be necessary in order to supplant the § 1983 remedy. Depending on the particular context, remedial schemes that do not afford meaningful judicial review may nevertheless be sufficiently 'comprehensive' to satisfy this Court's analysis, *e.g.* by providing appropriate administrative avenues for relief." Brf. at 17, fn 3. This statement, which is irrelevant to resolution of the instant case, appears to conflict with the government's claim that cases such as *Wright*,

(Continued on following page)

II. That A Particular Statute Is Silent On The Availability Of Attorneys' Fees Does Not Support A Conclusion That It Is "Incompatible" With Section 1983

The government also argues that if a statute does not contain a specific attorney fee provision, that statute is incompatible with § 1983 because § 1983 does contain an attorney fee provision. Brf. at 22-23 (citing the "American rule" and *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 695 (3d Cir. 2002)). This cannot be correct. If § 1983 were applicable only to statutes with a fee provision, its fee provision would be redundant. It is a fundamental canon of statutory construction that redundancies are to be avoided. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (statutes should not be construed as to render any provision redundant or superfluous); *United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994) (statutes should not be construed as to lead to an absurdity). The government's interpretation would render § 1983 redundant as to the recovery of attorney fees. The Court should therefore reject it.

Courts have routinely permitted § 1983 actions to go forward notwithstanding lack of an explicit attorney fee

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Wilder, and *Blessing* demonstrate that lack of a provision for judicial review in itself rendered the statutes at issue insufficiently comprehensive to find implied preclusion. This Court has, moreover, stressed that "[a] plaintiff's ability to invoke § 1983 cannot be defeated simply by 'the availability of administrative mechanisms to protect the plaintiff's interest.'" *Blessing*, 520 U.S. at 347. In any event, the import of the government's comment is that each remedial scheme must be carefully examined on a case-by-case basis to determine whether the relief provided for is sufficiently "comprehensive" to foreclose resort to § 1983 – a position directly contradictory to the government's invitation to the Court to announce simplistic new bright-line rules.

provision in the underlying statute. *See e.g. Maher v. Gagne*, 448 U.S. 122, 133 (1980) (claim predicated on 42 U.S.C. § 602); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (same); *National Home Equity Mortgage Ass'n v. Face*, 322 F.3d 802, 804 (4th Cir. 2003) (claim predicated on 12 U.S.C. § 3801 *et seq.*); *Native Village of Venetie IRA Council v. State of Alaska*, 155 F.3d 1150, 1153 (9th Cir. 1998) (claim predicated on 25 U.S.C. § 1911). Congress is presumed to be aware that courts have routinely permitted § 1983 claims to proceed notwithstanding lack of an attorney fee provision in the applicable statutory scheme. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1998) (Congress is presumed to be aware of how courts have interpreted the law and to take that interpretation into account in composing statutes). Had Congress found fault with this practice, it doubtless would have included language in the TCA (and other statutes that do not have an express attorney fee provision as to which courts routinely permit § 1983 cases to proceed) to ensure that its intent to foreclose such fees was understood. That it has not done so demonstrates the incorrectness of the government's position. *Id.; Maine*, 448 U.S. at 8 (Congress' silence in face of Court's many interpretive pronouncements on the scope of § 1983 significant evidence of Congressional intent).

Indeed, the government's position would nullify the very purpose of including a fee provision in § 1983 which is to encourage litigation of meritorious civil rights claims notwithstanding financial obstacles. *Felder*, 487 U.S. at 139 (providing a means for individuals whose federal constitutional or statutory rights are violated to recover damages or equitable relief is the central purpose of § 1983). *See also Jonas v. Stack*, 758 F.2d 567, 569 (11th Cir.

1985) (§ 1988's "primary function is to shift the costs of civil rights litigation from civil rights victims to civil rights violators."). To hold that § 1983 fees are not available just because the statute at issue does not expressly provide for them, would obviously undermine this Congressional intent. As the government's proposed bright-line rule would nullify § 1983's fee provision, the Court should reject it. *X-Citement Video*, 513 U.S. at 69-70 (statutes should not be construed as to lead to an absurdity); *TRW*, 534 U.S. at 31 (statutes should not be interpreted such as to render any provision nugatory).

III. Adoption Of The Two Proposed Bright-Line Rules Proposed By The Government Would Nullify Section 1983 Entirely

While adoption of the government's proposed bright-line rule on attorneys' fees would nullify § 1983's attorney fee provision, adoption of both of the bright-line rules proposed by the government would nullify § 1983 entirely. Statutes providing attorneys' fees for successful litigants obviously presume access to the courts. The government argues that access to the courts in itself renders a statute sufficiently "comprehensive" to evidence implicit preclusive intent. It also argues that a statute without an attorney's fee provision cannot be compatible with § 1983. Thus, according to the government's logic, no statute could *ever* provide a basis for a § 1983 claim. A statute that does not provide for attorneys' fees would be incompatible for that reason, and one that does provide for attorneys' fees would be too comprehensive. Such a facially absurd and disabling construction is obviously to be avoided.

IV. Creation Of Two Sweeping Bright-Line Rules That Would Greatly Restrict The Scope Of Section 1983 Is Unnecessary To Resolution Of The Instant Case

Fortunately, it is not necessary for the Court to resort to sweeping and destructive new rules in order to resolve the case before it. There is no reason why the Court cannot resolve the question as it has resolved all such questions in the past --by engaging in a careful examination of the entire remedial scheme to determine whether the "difficult showing" of comprehensiveness and incompatibility has been made. Neither party has limited itself to arguing that access to judicial review or access to attorneys' fees are the only factors to be considered in this analysis, and there is no reason for the Court to address the government's contentions in this regard.[4]

There is no need for the Court to eviscerate § 1983 in the manner suggested by the government in order to resolve this case. Instead, the Court can either apply the plain language of the savings clause or, if the Court is not convinced that clause is dispositive, proceed to apply the traditional, comprehensive analysis of all factors bearing on the scope of the remedial scheme at issue. The Court

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[4] Both sides, for example, will doubtless discuss the impact of the "expedited" nature of the judicial review provided by the TCA on the analysis. They will also certainly debate whether the TCA's savings clause is in itself dispositive, thus rendering examination of the "comprehensiveness" of the TCA's remedial scheme unnecessary. *Amici* herein express no opinion on these subjects, nor the other factors that will doubtless be extensively addressed in other briefing. *Amici* submit, however, that to the extent the Court concurs that any of the additional factors discussed by the parties or other *amici* are germane to the analysis, such factors reinforce the conclusion that resort to the drastic measures proposed by the government is unnecessary.

should therefore decline to announce the restrictive new rules urged by the government.

CONCLUSION

For the foregoing reasons, this Court should reject the government's invitation to craft new bright-line rules that any provision for judicial review forecloses resort to § 1983 and that lack of an attorney fee provision in itself renders a statute incompatible with § 1983.

Respectfully submitted,

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CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Alexander v. *Sandoval*, 532 U.S. 275 (2001). 16

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Conboy v. *AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001) 17

Franklin v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) 22

TABLE OF AUTHORITIES—Cont'd

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Golden State Transit Corp. v. *Los Angeles*, 493 U.S. 103 (1989) 11, 15, 19

Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) ..... *passim*

Howard v. *City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) 17

Lechtner v. *Brownyard*, 679 F.2d 322 (3d Cir.1982) 17

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Omnipoint Comm'ns, Inc. v. *Village of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205 (S.D.N.Y. 2004) ... 7, 21

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TABLE OF AUTHORITIES—Cont'd

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Primeco Personal Comm'ns, Ltd. P'ship v. *City of Mequon*, 242 F. Supp. 2d 567 (E.D. Wis. 2003) .. 12

Pennsylvania Pharmacists Ass'n v. *Houstoun*, 283 F.3d 531 (3d Cir. 2002) (*en banc*) 16

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USCOC of Va. RA #3, Inc. v. *Montgomery Cty. Bd. of Supervisors*, 245 F. Supp. 2d 817 (W.D. Va.), rev'd, 343 F.3d 262 (4th Cir. 2003) 7, 21

Verizon Comm'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004) 12, 26

VoiceStream Minneapolis, Inc. v. *St. Croix Cty.*, 342 F.3d 818 (7th Cir. 2003) 7

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Wright v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) 17

Statutes, Regulations, and Rules:

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42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

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47 U.S.C. § 276(b)(1)(A) 16

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47 U.S.C. § 332(c)(7) ..... *passim*

47 U.S.C. § 332(c)(7)(A) 5, 20, 21

47 U.S.C. § 332(c)(7)(B) ..... *passim*

47 U.S.C. § 332(c)(7)(B)(iii) 9, 11, 18, 28

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CAL. GOV'T CODE § 818.4 ..... 12, 22, 28

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VA. CODE ANN. § 15.2-2314 20-21

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Pub. L. No. 104-104, § 601(c)(1), reprinted at 47 U.S.C. § 152, historical and statutory notes 5, 11, 27, 28

Miscellaneous:

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TABLE OF AUTHORITIES—Cont'd

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141 CONG. REC. S8170 (daily ed. June 14, 1995) (statement of Sen. Gorton) 30

Brett D. Baber, *For Every Right There Is a Remedy: Civil Rights Litigation Pursuant to 42 U.S.C. § 1983*, 9 ME. B.J. 226 (1994) 10

Brief for the United States as Amicus Curiae Supporting Petitioners, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2003) (No. 01-679), available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-0679.mer.ami.pdf 14

Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985) .. 26

H.R. CONF. REP. NO. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 ..... 4, 6, 8, 20

Kevin M. O'Neill, Note, *Wireless Facilities Are a Towering Problem: How can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975 (1999) 29

Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States *v.* Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997) 27

TABLE OF AUTHORITIES—Cont'd

Page(s)

Timothy J. Tryniecki, *Cellular Tower Siting Jurisprudence Under the Telecommunications Act of 1996 – The First Five Years*, 37 REAL PROP. PROB. & TR. J. 271 (2002) 18, 28

BRIEF OF LOCAL GOVERNMENTS AND RELATED ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Michigan Coalition To Protect Public Rights-Of-Way (PROTEC) was formed in 1996 by several Michigan cities interested in protecting their citizens' control over public rights-of-way and their right to receive fair compensation for use of public property. Since PROTEC's formation, the residents and businesses of numerous cities, villages, and townships have benefited from the allied efforts of the coalition. PROTEC represents jurisdictions of all sizes through coordinated lobbying and litigation efforts at both the state and federal levels.

Amicus Texas Cities Coalition for Utilities Issues (TCCFUI) is an unincorporated nonprofit association of Texas cities concerned with issues involving telecommunications, gas, and electric utilities. TCCFUI has as members more than 100 cities in Texas, including many of the State's largest cities. TCCFUI represents the interests of its member cities in part by participating in legal, legislative, and regulatory activity affecting the rights of cities with respect to rights-of-way and utility issues.

Amici County of San Diego, California, City of San Diego, California, City of Los Angeles, California, City and County of San Francisco, California, City of Santa Fe, New Mexico, and City of Tucson, Arizona, are local governments as that term is

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

used throughout the Communications Act. See, *e.g.*, 47 U.S.C. § 253(c). *Amici* have been, or may be in the future, defendants in litigation under 42 U.S.C. §§ 1983 & 1988, seeking damages and attorneys' fees for "violations" of federal statutes.

Amicus California State Association of Counties (CSAC) is a non-profit corporation, with membership consisting of the 58 counties in the State of California. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, composed of county counsel throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties in California.

Amicus League of California Cities is an association of 474 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

Amicus Nevada Association of Counties (NACO) is a nonpartisan, nonprofit corporation founded in 1924 and composed of Nevada's county governments. NACO represents the interests of its members before all branches of both the state and the federal government.

Amicus League of Oregon Cities (LOC) is a voluntary association of 239 incorporated cities throughout the State of Oregon. LOC was founded in 1925 and pursues a core mission of working for strong, livable communities. In pursuit of its mission, LOC represents the common interests of its members on issues of critical concern to cities.

Amicus Association of Oregon Counties (AOC) is a volunteer-membership organization that represents all 36

Oregon counties. Its mission is to strengthen county government's ability to serve people.

Amici or their members are local municipal government organizations with authority that has been expressly preserved by the Communications Act—including the responsibility for making decisions on applications for permits to construct wireless service facilities (see 47 U.S.C. § 332(c)(7)) and managing use of the public rights-of-way by telecommunications carriers (see *id.* § 253). Under the reasoning of the court of appeals below, *amici* or their members potentially are subject to damages liability and attorneys' fees for exercising their reserved powers in ways that are later determined to violate the Communications Act. Such a regime threatens to impose crippling damage awards and attorneys' fees on local governments that can ill afford even the relatively minor expenses of defending against litigation. Because of their substantial experience with the specific legal issues in this case, their experience defending against suits under 42 U.S.C. § 1983 in general, and their understanding of the broader ramifications of the rule announced by the Ninth Circuit, *amici* are well situated to brief the Court on the merits of this case.

STATEMENT

The issue in this case is whether a cause of action under 42 U.S.C. § 1983, with the attendant attorneys' fees provision, 42 U.S.C. § 1988, is available when Congress has passed a preemptive statutory scheme with comprehensive remedial provisions as it did in the enactment of Section 704 of the Telecommunications Act of 1996 (TCA), 47 U.S.C. § 332(c)(7). Section 704 provides for expedited judicial appellate review of local zoning decisions to ensure compliance by state and local governments with its provisions. The section also provides for expedited judicial review for "[a]ny person adversely affected by any final action or failure to act by a State or local government," and in some circumstances (not relevant here) provides a right to "petition the [Federal Communications] Commission for relief." *Id.* § 332(c)(7)(B)(v).

The district court held that the scheme of judicial review granted it "broad authority to fas[hio]n an appropriate remedy that would bring expedited relief." Pet. App. 32a. And the Third Circuit earlier concluded that Section 332(c)(7)(B)(v) "provides judicial remedies that incorporate both notable benefits"—including expedited judicial review—"and corresponding limitations"—such as a short limitation period and no provision for damages or attorneys' fees. The court of appeals below became the first circuit to hold that the Communications Act's remedial scheme—with its "benefits" and "limitations"—would give way to a cause of action under Section 1983.[2]

The result reached by the court of appeals below is wrong because it eviscerates the congressional intent behind Section 332(c)(7)(B)(v); "remove[s] * * * completely the protection of the 'American Rule'" governing attorneys' fees (*Maine* v. *Thiboutot*, 448 U.S. 1, 25 (1980) (Powell, J., dissenting)); and "cannot be reconciled with the purposes for which § 1983 was enacted" (*ibid.*). "[I]t is only violations of *rights*, not *laws*, which give rise to § 1983 actions" (*Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002)), and the exceptionally weak foundation—if any—for concluding that Section 332(c)(7) confers private rights is all the more reason why Section 1983 remedies should not be engrafted onto it.

A. The Statutory Scheme

Congress passed the TCA, Pub. L. No. 104-104, 110 Stat. 56 (1996), to amend the Communications Act of 1934 and "accelerate rapidly private sector deployment of advanced communications to all Americans" by providing for a "pro-competitive, de-regulatory national policy framework." H.R. CONF. REP. NO. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124. That goal was accomplished in part by

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[2] A panel of the Eleventh Circuit reached the same result, but its decision was vacated. See *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), vacated, 260 F.3d 1320 (11th Cir.) (en banc), dismissed following settlement, 264 F.3d 1314 (2001).

selectively preempting state and local laws and regulations that Congress determined were contrary to the purposes of the Communications Act. See, *e.g.*, 47 U.S.C. § 332(c)(7)(B) ("Limitations"); *id.* § 253(a) (no prohibition on the ability of any entity to provide telecommunications service).

At the same time, Congress took great pains to *preserve* state and local authority when it was not inconsistent with the purposes of the Communications Act. See, *e.g.*, 47 U.S.C. § 332(c)(7)(A) ("[n]othing in this chapter shall limit or affect the authority of a State or local government"); *id.* § 253(c) ("[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers"). The preservation of state and local authority was also reflected in a general "savings clause," which states:

> (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. No. 104-104, § 601(c)(1), reprinted at 47 U.S.C. § 152, historical and statutory notes.

1. Section 332(c)(7) reads, in pertinent part:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service

facilities by any State or local government or instrumentality thereof–

* * *

> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

* * *

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be * * * supported by substantial evidence * * *.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days * * *, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act * * * that is inconsistent with clause (iv) may petition the Commission for relief.

The section is unambiguously a preemption provision, but it also *precludes* preemption by "preserv[ing] local zoning authority" except in enumerated circumstances. 1996 U.S.C.C.A.N. at 222 (section "preserves the authority of state and local governments over zoning and land use matters except in the limited circumstances set forth"); see also *VoiceStream Minneapolis, Inc.* v. *St. Croix Cty.*, 342 F.3d 818, 829 (7th Cir. 2003) (local governments "retain the authority to regulate the siting of wireless telecommunications facilities" subject to "procedural and substantive limitations" found in Section 332(c)(7)(B)(i)-(iv)). Congress's intent could not be any clearer: the inroads to state and local regulatory authority are only those expressly provided in Section 332(c)(7). The statutory language "except as provided in this paragraph" (Section 332(c)(7)(A)) plainly precludes the importation of liability under Sections 1983 and 1988.

Section 332(c)(7)(B)(v) enables an aggrieved party to seek a remedy in federal court if a state or local zoning authority makes a decision that exceeds the limitations set out in clauses (i) through (iv) of subparagraph (B). It expressly permits federal court review and requires that such review be conducted "on an expedited basis." Section 332(c)(7)(B)(v).

The history of litigation under clause (v) demonstrates that it has proved effective in achieving its purpose. Courts—including the district court in this case—have regularly granted injunctions when remedying violations of Section 332(c)(7)(B). See Pet. App. 13a-15a; see also, *e.g.*, *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *Omnipoint Comm'ns, Inc.* v. *Village of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 226 (S.D.N.Y. 2004); *USCOC of Va. RA #3, Inc.* v. *Montgomery Cty. Bd. of Supervisors*, 245 F. Supp. 2d 817 (W.D. Va.), rev'd, 343 F.3d 262 (4th Cir. 2003). In cases in which the local government's zoning decision is not preempted by Section 332(c)(7)(B), reviewing courts reach the opposite result. See, *e.g.*, *Voice Stream PCS I, LLC* v. *City of Hillsboro*, 301 F. Supp. 2d 1251 (D. Or. 2004). No doubt can exist that parties have effective means for federal court review.

2. Other provisions of the Communications Act also operate to preempt state and local regulatory authority in the telecom arena. For example, 47 U.S.C. § 253—a provision

governing state and local right-of-way regulations and compensation for use of the right-of-way, the operation of which is very important to *amici* and their members—reads in part:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> * * *
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers * * *.
>
> (d) Preemption
>
> If * * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement, to the extent necessary * * *.

The section "is intended to remove all barriers to entry," and "preempts" regulations that undermine that purpose, while also providing a safe harbor for actions of state and local governments regarding management of rights-of-way and requiring fair and reasonable compensation. 1996 U.S.C.C.A.N. at 138. It therefore "focuses on limiting the actions of local government." *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1265 (10th Cir. 2004).

Like Section 332(c)(7), Section 253 accomplishes its purpose. Plaintiffs have brought preemption challenges to state or local regulations with jurisdiction premised on 28 U.S.C. § 1331. See *City of Santa Fe*, 380 F.3d at 1264. "'A plaintiff

who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question * * *.'" *Ibid.* (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)); see also *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236 (9th Cir. 2004) (remanding to the district court for additional consideration of the preemption issue).

B. The Proceedings in this Case

Respondent is an individual who constructed a wireless-service antenna more than 50 feet tall on his property—although his permit allowed only 40 feet, and required nighttime "nesting" at 30 feet in height. Also in violation of the permit, which allowed only amateur use, respondent engaged in both amateur and commercial uses. When respondent was enjoined to comply with the amateur use restriction, he applied for a conditional use permit, which would allow commercial use as well. Pet. App. 2a. The City Council of Rancho Palos Verdes denied respondent's application. Pet. App. 2a; see *id.* at 23a. During the administrative proceedings, respondent's counsel recognized that the purpose of Section 332(c)(7)(B) was to protect "the end user of the services," not the "individual who has a license." Admin. Rec. 54.

1. As was his right under the Communications Act (see Section 332(c)(7)(B)(v)), respondent appealed the city council's denial to federal district court. Pet. App. 16a-17a. He appended a claim for money damages under 42 U.S.C. § 1983. Pet. App. 17a. The district court held that the denial of a conditional use permit violated the Communications Act, because the decision was not "supported by substantial evidence contained in the written record" (Section 332(c)(7)(B)(iii)). Pet. App. 30a. The court then noted its "broad authority to fas[hio]n an appropriate remedy that would bring expedited relief" to respondent. *Id.* at 32a (citing authorities granting mandamus and injunctive relief). The court granted complete injunctive relief to respondent, ordering petitioners within 14 days "to adopt a new resolution

granting plaintiff a Conditional Use Permit," and retained jurisdiction to hear future disputes in connection with the injunction. *Id.* at 14a-15a. The district court held, however, after ordering briefing on the question, that "the remedies available to plaintiff are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available to plaintiff." *Id.* at 14a.[3]

2. Respondent appealed the denial of damages under Section 1983. The Ninth Circuit held that respondent had the burden to establish the violation of a federal "right." Pet. App. 3a-4a. The court then held that there was a rebuttable presumption of entitlement to remedies under Section 1983. *Ibid.* In the court of appeals' view, the remedies available to a plaintiff claiming that the denial of a permit violated Section 332(c)(7)(B)—a right of action in federal court on an expedited basis and a right to petition the Federal Communications Commission for relief—were not adequately "comprehensive" to "'close the door on § 1983 liability.'" *Id.* at 4a-5a (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997)). The court of appeals apparently would have preferred that the Communications Act contain "remedies such as damages, injunctions, attorney's fees, or costs." Pet. App. 5a.[4] The court of appeals then considered the "savings" clause (Section 601(c)(1)), which, it held, demonstrated Congress's express intent to preserve the Section 1983 remedy. Pet. App. 10a.

[3] Because respondent was not the "prevailing party" on the Section 1983 claim under the district court's holding, he had no entitlement to attorneys' fees under 42 U.S.C. § 1988. And because "[i]n contrast to a plaintiff who prevails, defendants are severely limited as to when they may obtain attorney's fees under Section 1988" (Brett D. Baber, *For Every Right There Is a Remedy: Civil Rights Litigation Pursuant to 42 U.S.C. § 1983*, 9 ME. B. J. 226, 233 (1994)), petitioners had no way to recover the expenses incurred in litigating the Section 1983 claim.

[4] The court rejected the contrary holding of the Third Circuit in *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687 (3d Cir. 2002), arguing that "the TCA contains *procedural*, rather than *remedial*, provisions." Pet. App. 8a-9a (emphasis in original).

SUMMARY OF ARGUMENT

The Ninth Circuit erred in concluding that respondent could assert a Section 1983 claim, with attorneys' fees under Section 1988 if the claim is successful, based on the fact that petitioners' decision to deny respondent's application for a conditional use permit was held preempted by Section 332(c)(7)(B)(iii). No basis exists for a Section 1983 claim here.

I. A claim under Section 1983 for a violation of a federal statute exists only if the statute creates rights enforceable under that section. The question that has divided the courts of appeals is whether the remedial scheme of Section 332(c)(7) impliedly forecloses resort to Section 1983. But—as the Solicitor General correctly observed in his brief in the *Gonzaga* case—that question should not be divorced from the question whether the statute creates private rights, for the entire inquiry is one into congressional intent. Whether a federal statute creates a "right" enforceable under Section 1983 turns on three factors.

Applying the first factor—whether the statute was intended to benefit the putative plaintiff (see *Gonzaga*, 536 U.S. at 284)—demonstrates that there is no such right under Section 332(c)(7). That is especially the case where, as here, the statutory scheme in question is a preemption scheme. See *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989). The second factor, which asks whether the right asserted under the statute is sufficiently clear to be enforced in court, also militates against a finding of a "right" here.

II. Even if Section 332(c)(7) is determined to create "rights," its remedial scheme is fully comprehensive. Permitting suit under Section 1983 frustrates—even eviscerates—the scheme Congress created. The injunctive remedy is a natural outgrowth of the body of zoning law that underlies Section 332(c)(7), in which expedited judicial review and remedies limited to injunctive relief are the norm and

damages remedies often are prohibited by statute. It is thus natural to interpret Section 332(c)(7) not to permit damages or attorneys' fee awards. The section is enforced instead by injunctive relief. See, *e.g.*, *Primeco Personal Comm'ns Ltd. P'ship* v. *City of Mequon*, 242 F. Supp. 2d 567, 582 (E.D. Wis.) ("Most courts have held that the appropriate remedy [under Section 332(c)(7)(B)(v)] is an order to issue the relevant permit."), aff'd, 352 F.3d 1147 (7th Cir. 2003). Additionally, the 30-day limitation period and requirement of expedited review are "notable benefits and corresponding limitations" (*Nextel Partners, Inc.*, 286 F.3d at 694) that would be undermined by permitting suit under Section 1983.

The savings clause supports this conclusion. As this Court recently has held, a savings clause "does not create new claims that go beyond" the claims that otherwise would exist. *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). And the savings clause preserves "State and local law" just as it does federal law. California state law—like that of many other States—does not permit the imposition of damages or attorneys' fees in a suit based on a discretionary permitting decision. See CAL. GOV'T CODE § 818.4. The Section 1983 remedy undermines those laws.

III. The harms attendant on overuse of Section 1983 counsel against permitting its use in this statutory scheme. Litigation under Section 332(c)(7) and the similar Section 253 (applicable to right-of-way management and compensation) already is substantial and very expensive, and promises to increase if damages remedies and attorneys' fees are allowed. The local government defendants in these cases (usually small cities and towns) have limited resources and often are barely able to afford the cost to defend the lawsuit. The natural result of the Ninth Circuit's approach would be to encourage municipalities to grant permits that maybe should not be granted, rather than run the risk of incurring crippling litigation expenses. Nothing indicates that Congress had such a one-sided result in

mind when it expressly *preserved* local government authority to continue to make the zoning decisions they always have made.

ARGUMENT

It is nonsensical to conclude, as the Ninth Circuit panel did below, that by specifically *failing* to provide for damages and attorneys' fees in a suit challenging a zoning decision as pre-empted by the Communications Act, Congress meant for those remedies to be available through Section 1983 and Section 1988. The holding below boils down to this: if the remedies Congress made available under a federal statute are not the kind of remedies *that a court* thinks sufficient, it is appropriate to permit suit under Section 1983. If that rule prevails, Congress will be required in the future expressly to *disavow* enforcement through Section 1983—a result that cannot be reconciled with this Court's instruction that the necessary inquiry is "whether Congress *intended to create a federal right*." *Gonzaga*, 536 U.S. at 283 (emphasis in original).

Instead, in this case the Court should apply the rule—which it unanimously accepted in 1997—that to sue under Section 1983 plaintiffs are required to assert the violation of a federal right, not merely a violation of federal law. *Blessing*, 520 U.S. at 340. Even if they do so, Section 1983 remedies are available only to the extent that they are not inconsistent with the statutory scheme. *Id.* at 341; see also *Three Rivers Center for Indep. Living, Inc.* v. *Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 419-422 (3d Cir. 2004).

I. Section 332(c)(7) Does Not Create Rights Enforceable Through a Cause of Action Under Section 1983

The court of appeals held "that the TCA clearly grants enforceable 'rights'" (although the question does not seem to have been disputed by the parties). Pet. App. 4a (citing *Blessing*, 520 U.S. at 340-341). Likewise, the Seventh Circuit held in *Primeco Personal Comm'ns Ltd. P'ship* v. *City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003), also without analysis: "local

officials violated a federal right of the plaintiff." But, contrary to these conclusions, an analysis of Section 332(c)(7) demonstrates that it is by no means clear that respondent has rights enforceable under Section 1983. As respondent's counsel conceded, "the focus of the statute" is "to protect the end user of the services"—*not* "to protect the individual who has a license." Admin. Rec. 54.

The "rights" issue, though apparently not disputed below, is an indispensable corollary of the question whether Section 1983 remedies are available under the Communications Act. As the Solicitor General has argued:

> Because the "key to the [Section 1983] inquiry is the intent of the legislature," the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided.

Brief for the United States as Amicus Curiae Supporting Petitioners, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2003) (No. 01-679), at 23-24 (citation omitted), available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-0679.mer.ami.pdf. The view of the Third and Seventh Circuits that the Section 1983 and 1988 remedies are incompatible with the comprehensive remedial scheme under Section 332(c)(7)(B)(v) is bolstered by a correct analysis of the private-right issue.[5]

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[5] The issue of rights under the Communications Act is particularly important because it has the potential to affect numerous similar statutory provisions. For example, although it is not at issue in this case, Section 253 also is a preemption provision that is sometimes erroneously invoked in disputes over tower siting. Although the Court need not address the interplay of Section 253 and Section 1983 in a case in which Section 253 is not directly at issue, it is important for the Court to understand the Section 253 litigation, because the reasoning of the lower courts in some of the Section 253 cases may help shed light on the issues that *are* directly presented here. Like Section 332(c)(7), Section 253 preserves some state and local regulatory authority—most notably to manage the public rights-of-way. The section also preempts certain state or local regulations without mentioning what parties are intended to benefit from the preemption. As the Tenth Circuit recently observed in holding that a telecommunications carrier suing under Section 253 did not have a remedy under Section 1983: "The language * * * focuses on limiting the actions of local government not on protecting a benefitted class." *City of Santa Fe*, 380 F.3d at 1265. Despite some differences between Section 332(c)(7) and Section 253 (see 380 F.3d at 1267), the same reasoning should be applied here.

Whether a federal statute creates a right enforceable under Section 1983 turns on an evaluation of three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Blessing, 520 U.S. at 340-341 (citations omitted).[6] Importantly, not every violation of a federal statute constitutes a deprivation of a federal *right*. *Golden State*, 493 U.S. at 106. "Personal rights are those intentionally and 'unambiguously conferred' through 'rights-creating' language." *Three Rivers*, 382 F.3d at 419-420 (quoting *Gonzaga*, 536 U.S. at 283, 284).

The first *Blessing* factor is perhaps the most important. This Court recently has elucidated that rights-creating language in a federal statute must "unmistakabl[y] focus on the benefited class." *Gonzaga*, 536 U.S. at 284. It is not enough that the Act create a class of beneficiaries. "Congress" must have "intended to confer federal rights upon those beneficiaries" for a Section 1983 suit to be available. *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981). The fact that an individual, like respondent, is benefited, does not mean that Congress intended to confer on

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[6] We do not dispute that the third factor is met, but for the reasons given below the first and second factors are not.

that individual a right to sue under Section 1983. "[T]he question whether a statute *is intended to benefit* particular plaintiffs is quite different from the question whether the statute *in fact benefits* those plaintiffs * * *." *Pennsylvania Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531, 535 (3d Cir. 2002) (en banc); see also *Three Rivers*, 382 F.3d at 419.

This Court requires that the statute contain "rights-creating language." See *Cannon* v. *University of Chicago*, 441 U.S. 677, 693 n.13 (1979). In *Cannon*, the statutes being interpreted spoke directly to the putative plaintiff. See *id.* at 693-694. In *Golden State*, the Court held that the National Labor Relations Act (NLRA) creates rights. That Act contained this policy statement: "'It is the purpose and policy of this chapter to prescribe the legitimate rights of both employees and employers in their relations affecting commerce.'" 493 U.S. at 110 n.6; see also *Livadas* v. *Bradshaw*, 512 U.S. 107, 133-134 (1994). But rights-creating language is not held to exist when the statute "focus[es] on the person regulated rather than the individuals protected." *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001).

The reference in Section 332(c)(7)(B)(v) to "[a]ny person adversely affected" does not demonstrate a rights-creating focus on would-be antenna builders, but—through its generality—just the opposite. When Congress wished to identify a specific class of beneficiaries and use rights-creating language in the Communications Act, it knew how to do so. See, *e.g.*, 47 U.S.C. § 276(b)(1)(A) ("the Commission shall * * * establish a per call compensation plan to ensure that *all payphone service providers* are fairly compensated for *each and every* completed intrastate and interstate call") (emphasis added).

Unlike Section 276(b)(1)(A), Section 332(c)(7)(B) does not "unmistakably focus" on respondent, or on a class of potential plaintiffs of which he is a member. Rather, the subparagraph focuses on state and local governments. It specifically lists four things that "any State or local government" must, or must not, do, without reference to what person or entity is the intended beneficiary of these requirements and prohibitions. In fact, the

only clause of subparagraph (B) that references potential plaintiffs—clause (v)—states a scheme for judicial review that is *alternative* to, and inimical to, the Section 1983 claim respondent presses here. See pp. 24-28, *infra*.

In *Qwest Corp.* v. *City of Santa Fe*, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'd in part, rev'd in part, 380 F.3d 1258 (10th Cir. 2004), the court noted: "Section 253 was enacted as part of a series of amendments to the Communications Act of 1934. As originally enacted, '"[t]he Communications Act of 1934 did not create new private rights."' Thus, if Congress had intended Section 253 to create new private rights that could be enforced under Section 1983, one would have expected this change to be noted more clearly." *Id.* at 1315 (quoting *Howard* v. *City of Burlingame*, 937 F.2d 1376, 1379 (9th Cir. 1991), in turn quoting *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 14 (1942)). That analysis applies with equal force to Section 332(c)(7)(B).

Furthermore, the *reason* why Section 332(c)(7)(B) places some constraints on local zoning decisions is not because those who wish to erect antennas—unlike victims of discrimination (*Cannon*) or low-income individuals in need of federal assistance (*Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987))—are people Congress particularly wished to protect. Rather, like many other provisions of the Communications Act, Section 332(c)(7)(B) seeks to advance the *public* interest.[7] Section 332(c)(7)(B) strives to prevent unreasoned or unreasonable zoning decisions from interfering with the building of the infrastructure necessary to support the Nation's system of wireless communications. Those who build that infrastructure are beneficiaries of Section 332(c)(7)(B), but not all beneficiaries of a statute are given personal rights of the

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[7] "[T]he purpose of the Telecommunications Act is not to benefit individual plaintiffs but to 'protect the public interest in communications.'" *Conboy* v. *AT&T Corp.*, 241 F.3d 242, 254 (2d Cir. 2001) (quoting *Lechtner* v. *Brownyard*, 679 F.2d 322, 327 (3d Cir.1982), in turn quoting *Scripps-Howard Radio*, 316 U.S. at 14)).

sort that can be enforced under Section 1983 or an implied private right of action. See *Three Rivers*, 382 F.3d at 419.

The application of the second *Blessing* factor in this case also counsels against construing the Communications Act to grant rights enforceable under Section 1983. More than one provision of Section 332(c)(7)(B) implicates this factor. This case was decided under the "substantial evidence" standard of Section 332(c)(7)(B)(iii) (Pet. App. 25a-26a), a notoriously indefinite standard of review found throughout the body of federal administrative law. "As early as 1999, one court felt there was 'little agreement among the courts as to the meaning of substantial evidence under the TCA.'" Timothy J. Tryniecki, *Cellular Tower Siting Jurisprudence Under the Telecommunications Act of 1996 – The First Five Years*, 37 REAL PROP. PROB. & TR. J. 271, 279 (2002) (quoting *Primeco Personal Comm'ns, L.P.* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). The standard has variously been described to mean "more than a mere scintilla, but less than a preponderance"; "not a large or considerable amount of evidence"; and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 279 (internal quotations omitted).

Other cases arise under Section 332(c)(7)(B)(i)(II). The circuits are split on how to interpret the preemption of zoning decisions that "have the effect of prohibiting the provision of personal wireless services." *Ibid.* In *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 428-429 (4th Cir. 1998), the Fourth Circuit held that sub-clause (II) applied only to blanket bans on wireless infrastructure, not to individual zoning decisions. In *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630, 642-643 (2d Cir. 1999), the Second Circuit adopted a more liberal interpretation, holding that it applied in any case in which a remote user lacked access to wireless facilities. See also *Omnipoint Comm'ns Enters., L.P.* v. *Zoning Hrg. Bd.*, 331 F.3d 386, 397-398 (3d Cir. 2003). Finally, in *Second Generation Props. L.P.* v. *Town of Pelham*, 313 F.3d 620, 633-634 (1st Cir. 2002), the First Circuit held that zoning-board decisions that deny individual providers the opportunity to fill gaps in their networks are preempted. Like the substantial evidence standard of clause (iii), the conflicting interpretations of effective prohibition under sub-clause (II) render that preemption provision—if it could be called a "right" at all—so "vague and amorphous" that its violation cannot give rise to a suit under Section 1983. Were the rule otherwise, localities would be forced to guess at which of the many standards might govern their decision, at the pain of enormous penalties if they should guess wrong.

Moreover, Section 332(c)(7) properly is understood to be a preemption provision. *Town of Amherst* v. *Omnipoint Comm'ns Enters., Inc.*, 173 F.3d 9, 16 (1st Cir. 1999); see also pp. 5-7, *supra*. "A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law." *City of Santa Fe*, 380 F.3d at 1266. "Given the variety of situations in which preemption claims may be asserted * * *, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Golden State*, 493 U.S. at 107-108. Preemption provisions are interpreted instead simply to grant priority to federal laws that conflict with state or local laws, by operation of the Supremacy Clause. As noted above, the NLRA preemption scheme in *Golden State* was accompanied by unambiguous rights-granting language. In this case, by contrast, "congressional pre-emption benefits particular parties" such as respondent "only as an *incident* of the federal scheme of regulation." *Id.* at 109 (emphasis added).

II. Sections 1983 and 1988 Are Irreconcilable with the Comprehensive Remedial Scheme Under Section 332(c)(7)(B)(v)

Even if it is possible to conclude that Section 332(c)(7)(B) creates substantive rights enforceable under Section 1983, the support for that proposition is shaky enough to cast serious

doubt on the claim that Congress intended to permit Section 1983 remedies to supplement and to supplant the statutory enforcement scheme. The comprehensive scheme of judicial review that Congress did enact precludes resort to the remedies of Sections 1983 and 1988.

A. The court of appeals correctly concluded that a plaintiff who successfully appeals, under Section 332(c)(7)(B)(v), a permit denial by a local government is not entitled by the force of that section alone to damages, costs, or attorneys' fees. Pet. App. 5a. Congress instead intended the section to operate in the same manner as does any appellate review provision, permitting the reviewing court to order the decisionmaker below—usually a local zoning board—to reach a contrary decision. See 1996 U.S.C.C.A.N. at 223 (noting that an aggrieved party "appeals" a decision denying a permit); see also *Primeco*, 352 F.3d at 1151 (discussing arguments for and against a "remand" to municipal authorities, and noting that the main argument against remand is delay).

1. That Section 332(c)(7) simply imports local zoning law, refining it to fit the purposes of the Communications Act, is apparent from the title of the paragraph: "Preservation of local zoning authority." Local governments retain the authority to make the decisions they always have made "regarding the placement, construction, and modification of personal wireless service facilities." Section 332(c)(7)(A). The substantial evidence requirement "is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements." *ATC Realty, LLC* v. *Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (internal quotations omitted). Also in keeping with the usual scheme for contesting zoning decisions—which in most States involves a process such as an appeal, a writ of mandamus, or a proceeding in certiorari (see, *e.g.*, IND. CODE § 36-7-4-1003(a); MASS. GEN. LAWS ANN. ch. 249 § 5; VA. CODE ANN. § 15.2-2314)—Congress allowed review of a permit denial "in any court of competent jurisdiction." Section 332(c)(7)(B)(v).

This case, and other appeals brought under the section, demonstrate that preserving this traditional appellate review process for wireless siting decisions has been successful. Permit denials that are preempted by the section have been remedied in as little time as several months by a court order instructing the local zoning boards to grant the permits. See *Village of Tarrytown*, 302 F. Supp. 2d 205 (five months); *Montgomery Cty. Bd.*, 245 F. Supp. 2d 817 (six months). This case is one in which respondent was awarded complete relief when the district court issued an injunction ordering the local zoning board to grant the conditional use permit within two weeks of the court's final order. Pet. App. 14a-15a. Allowing further remedies under Sections 1983 and 1988 would confer a windfall where none is necessary.

2. Appeals from zoning-board decisions historically have not been treated as actions for damages. In California specifically, but in many other States as well, local governments actually are *immune* from damages when plaintiffs successfully appeal zoning decisions. See CAL. GOV'T CODE § 818.4. The scheme of zoning-board decisions and judicial review unambiguously was imported into Section 332(c)(7) by the "[p]reservation of local zoning authority." Congress also was clear that no other limits were placed on local zoning authority as it related to wireless service facilities. See Section 332(c)(7)(A).

The decision from the Seventh Circuit holding that the Communications Act's comprehensive remedial scheme prevented resort to Section 1983 contained dictum about the remedies that might be available under Section 332(c)(7)(B)(v), which, according to that court, might include damages as well as injunctive relief. See *Primeco*, 352 F.3d at 1152-1153. The Third Circuit in *Nextel Partners* likewise observed, "the availability of all appropriate remedies is generally presumed." 286 F.3d at 695 n.6. But the court in *Nextel Partners* continued: "As a matter of practice, however, the typical relief in cases like the one before us has been injunctive. Four district

courts have expressly held that damages are not available under the TCA itself." *Ibid.* (citations omitted).

The approach those district courts have taken to remedies under Section 332(c)(7)(B)(v) undoubtedly is the correct one. In *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992), this Court once again "recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." Following that venerable rule requires courts to ask what remedies are "appropriate." In *Franklin*, the plaintiff sued over egregious and intentionally tortious conduct, quite unlike the failures to grant a conditional use permit at issue here. See *id.* at 63-64 (recounting sexual harassment and rape of a minor). *Franklin* thus specifically distinguished between the more limited remedies that might be available "when the alleged violation was *unintentional*," and those available for an "*intentional*" violation. *Id.* at 74. Under *Franklin*'s analysis of "appropriate" remedies for a violation of a federal statute, there is nothing inconsistent about concluding, as most courts have, that injunctive or mandamus relief is the appropriate recourse for zoning decisions that do not comport with the limitations on local zoning-board authority found in Section 332(c)(7)(B).

This Court has since refined the *Franklin* rule for determining the appropriate remedies for violations of federal rights created by Spending Clause legislation. In *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002), the Court held that—consistent with the contract-law nature of Spending Clause legislation—the "appropriate" remedies included those to which the state or local government anticipated being subjected when it agreed to participate in the federal scheme. "A remedy is 'appropriate relief' only if the funding recipient is on notice that by accepting federal funding, it exposes itself to liability of that nature." *Ibid.* (internal citation omitted). *Barnes* demonstrates that, contrary to the Seventh Circuit's dictum (*Primeco*, 352 F.3d at 1152-1153), the question of "all appropriate remedies" is not the end of the analysis, but only the beginning. In the case of

zoning-board decisions later held to be preempted, the "appropriate" remedy on appeal is simply a reversal of the decision.

B. The Communications Act contains a "comprehensive" remedial scheme for a plaintiff complaining of an improper permit denial. The Court should follow the analysis of the comprehensiveness of the remedies available under Section 332(c)(7)(B)(v) adopted by the Third Circuit in *Nextel Partners*: "[T]he remedial scheme provided by the TCA * * * is comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." 286 F.3d at 694. That court pointed to the opportunity for expedited federal review, which "may provide speedy redress for violations of the Act." *Id.* at 695. It also noted the "corresponding limitation[]" of the 30-day filing requirement. *Id.* at 694-695. By contrast, the Ninth Circuit simply—and incorrectly—held that Section 332(c)(7)(B)(v) "contains no remedies at all." Pet. App. 7a. It instead termed the bold new power granted federal courts in clause (v) to entertain appeals from local zoning decisions "procedural" (*id.* at 6a), thus trivializing the Act's alteration of the federal-state balance and creation of a new federal remedy even while erroneously elevating the same provision to the status of a private "right." See pp. 13-19, *supra*.

1. In *Middlesex Cty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court stated the test for determining whether a federal statutory scheme permitted suit seeking remedies under Section 1983. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude a remedy." *Sea Clammers*, 453 U.S. at 20. In that case, the Court held that the substantive Acts contained "enforcement mechanisms" that were sufficiently comprehensive to preclude suit under Section 1983. *Ibid.*

The remedial scheme at issue in *Sea Clammers*, 453 U.S. at 13-14, though "unusually elaborate," did not give any greater remedial powers to *private individuals* (as opposed to the gov-

ernment) than does the remedial scheme under Section 332(c)(7)(B)(v). That statutory scheme permitted private individuals to "seek judicial review" of actions by the EPA Administrator. *Sea Clammers*, 453 U.S. at 13-14. Additionally, private persons could "sue for injunctions to enforce these statutes," if they first complied with specified procedures. *Id.* at 14. The private suit provisions were, like those at issue here, subject to procedural burdens far more stringent than those under Section 1983—including "in most cases" a 60-day advance-notice-of-suit requirement (*Sea Clammers*, 453 U.S. at 15) and, in certain circumstances, a 120-day limitations period (see 33 U.S.C. § 1319(g)(6)(B)(ii)). In *Sea Clammers*, as here, there also was no indication that individuals had statutory authorization to sue for *damages*. 453 U.S. at 14.

Although the Seventh Circuit in *Primeco*, 352 F.3d at 1152, held that *Sea Clammers* is "distinguishable because the Telecommunications Act is silent on remedies beyond merely conferring a right to sue to enforce the Act," the *private* remedial scheme in that case was functionally indistinguishable from the remedies available under clause (v): the citizen-suit provisions "authorize[d] private persons to sue for injunctions to enforce the[] statutes." *Sea Clammers*, 453 U.S. at 14; cf. *Primeco*, 242 F. Supp. 2d at 582 (canvassing authorities and concluding that "the appropriate remedy is an order to issue the relevant permit").

2. The remedial scheme available under clause (v) therefore is "comprehensive" in the relevant sense: it gives "any court of competent jurisdiction" power to entertain an appeal of a zoning-board decision in and cabins that right with a 30-day limitation. Section 332(c)(7)(B)(v). In "fasten[ing], barnacle like" "general remedial statutes" (*Primeco*, 352 F.3d at 1153) to create remedies where Congress had created none, the Ninth Circuit's holding below does just what this Court disparaged in *Smith* v. *Robinson*, 468 U.S. 992 (1984). "[W]hen a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the

remedial apparatus of § 1983." *Id.* at 1003. Rather than interpreting the statute to provide the remedies that Congress intended to make available, the Ninth Circuit held that—because other remedies it thought appropriate were not specifically provided—the gaps must be filled in by permitting suit under Section 1983. See Pet. App. 5a ("the TCA does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs").

The effort of the court below to distinguish *Sea Clammers* was particularly misguided. The court merely noted that, in *Sea Clammers*, "the two rights-creating statutes at issue had 'unusually elaborate enforcement provisions.'" Pet. App. 6a (quoting *Sea Clammers*, 453 U.S. at 13). Initially, even this distinction is insupportable. See pp. 23-24, *supra* (comparing the injunctive remedy in *Sea Clammers* with the remedy usually applied under Section 332(c)(7)(B)(v)). The attempt at distinguishing *Sea Clammers* also highlights the Ninth Circuit's willingness to subordinate Congress's intent to its own view of an appropriate remedial scheme. The court noted that this Court had held the remedial scheme in *Sea Clammers* to be what Congress considered "'appropriate,' and refused to read more into it." Pet. App. 7a. In this case, by contrast, according to the court of appeals: "While one may argue that the lack of any damages in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." Pet. App. 7a. But nothing supports the Ninth Circuit's preference for the latter justification.

The availability of attorneys' fees under Section 1988 for a successful plaintiff is especially at odds with the remedies provided in the Communications Act. Section 1988 provides advantages to plaintiffs clever enough to couch violations of the Communications Act as remediable under Section 1983—even though attorneys' fees have no basis in federal law or in traditional state handling of appeals from zoning decisions. Cf.

Maine v. *Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting) (noting the danger of eviscerating the "American Rule": "[I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.").

3. Contrary to the holding of the court below (Pet. App. 10a-12a) and to respondent's arguments in this Court (Br. in Opp. 19-20), nothing about the savings clause (Section 601(c)(1)) demonstrates a congressional intent to "preserve" the Section 1983 remedy. This Court has never interpreted a "savings clause" to grant remedies that did not otherwise exist, and recently held that the antitrust savings clause (Section 601(b)(1)) "does not create new claims that go beyond existing * * * standards" under the relevant preexisting body of law. *Trinko*, 124 S. Ct. at 878. That holding applies with equal force to Section 601(c)(1).

"Section 1983 is only a vehicle for substantive claims that have their base elsewhere. It is not an independent source of constitutional or statutory rights." Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 22 (1985). The Section 1983 cause of action exists only if Congress has explicitly granted rights enforceable through litigation under the statute. See pp. 15-16, *supra*. To interpret the savings clause to preserve Section 1983 rights would be to elevate Section 1983 to the status of substantive law—a position that *amici* are unaware it ever has been held to occupy. For this reason, this Court in *Sea Clammers* had no difficulty holding that Section 1983 remedies were not available, despite the presence in that case of a statutory savings clause. 453 U.S. at 20 n.31 (holding that the savings clause was intended "to allow further enforcement of antipollution standards arising under *other* statutes or state common law").

In fact, an analysis of the language in the savings clause leads to the opposite conclusion. The clause protects *state* and *local* laws, unless the Communications Act "expressly" provides that they are "modif[ied], impair[ed], or supersede[d]."

Section 601(c)(1). The court below failed to appreciate that, by interpreting Section 332(c)(7)(B)(v) to import Section 1983, it interpreted the Communications Act to do just what Section 601(c)(1) says it does not.[8]

Under California law, "[a] public entity is not liable for an injury caused by the * * * denial * * * of * * * any permit * * * where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued." CAL. GOV'T CODE § 818.4. "Every state has some" similar "discretionary function exception" to liability (Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States *v.* Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 489 (1997)) that may be violated by permitting damages remedies against a local government entity for making zoning decisions later determined to be preempted.

Likewise, California and other States have laws adopting the "American Rule" for attorneys' fees. See, *e.g.*, CAL. CIV. PROC. CODE § 1021. By awarding fees to a successful plaintiff, Section 1988 abrogates the American Rule. See *Maine* v. *Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting); *Primeco*, 352 F.3d at 1152 (if Section 1983 remedies are permitted, "the American rule goes out the window"). The application of Section 1988 to appeals under the Communications Act modifies state laws regarding attorneys' fees as well, in contravention of Section 601(c)(1).[9]

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[8] Even without the express savings clause, this Court has held that "matters left unaddressed" in a comprehensive and detailed federal statutory provision "are presumably left subject to the disposition provided by state law." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994).

[9] More even than permitting state laws to be trumped in violation of the savings clause, the Ninth Circuit's rule imposes an inequity that the States adopting the American Rule have sought to avoid—permitting only a prevailing plaintiff, not a prevailing local government, to seek attorneys' fees.

III. Allowing Section 1983 Remedies in this Context Produces Results that Congress Did Not Intend

The provisions of Section 1983 and Section 1988 were enacted to protect "socially marginal, unpopular, and impecunious" individuals with causes of action against "well-funded public officers in cases whose social and political significance may dwarf the monetary stakes." *Primeco*, 352 F.3d at 1152. Nothing about zoning-board decisions, or appeals of adverse decisions under Section 332(c)(7)(b)(v), fits this paradigm. Just the opposite is true. Plaintiffs—telecommunications companies or entrepreneurs such as respondent—are able to finance their own litigation, at least as effectively as are parties to other court proceedings subjected daily to the "American Rule" for attorneys' fees. And defendants in these cases can easily be "small towns, such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen." *Primeco*, 352 F.3d at 1152.

The burdens of defending litigation under both Sections 332(c)(7) and 253 already is substantial and often extremely expensive. "[S]ection 332(c)(7) of the TCA has been highly litigated. In slightly over five years since the first reported case, at least 113 federal and 17 state decisions have construed the TCA." Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 272. Moreover, the "'statute fairly bristles with potential issues, from the proper allocation of the burden of proof through the available remedies for violation of the statute's requirements.'" *Id.* at 273 (quoting *Town of Oyster Bay*, 166 F.3d at 494). The limitation on local zoning authority that the district court held was violated in this case—the requirement under Section 332(c)(7)(B)(iii) that a permit denial be supported by substantial evidence—is "the most elusive and litigated tenet" of the statute. Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 272. This litigation promises only to increase if attorneys' fees and damages under Sections 1983 and 1988 are added to the appellate-review remedy that the section already provides.

Commentators have noted the challenges facing local zoning boards under Section 332(c)(7). "Wireless facilities, such as a cellular antenna tower or Personal Communication Systems (PCS) monopole, face the classic [Locally Undesirable Land Uses] consumer conundrum: consumers want their cellular, PCS, or Specialized Mobile Radio (SMR) service on demand, and at an affordable price, but few consumers want to allow the service's physical infrastructure to infiltrate their neighborhood." Kevin M. O'Neill, Note, *Wireless Facilities Are a Towering Problem: How can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975, 975-976 (1999). This produces a seemingly irreconcilable tension between wireless providers, which "want rapid system development and taller, more powerful facilities," and local governments, which "want to choose the precise placement of wireless facilities and make those facilities as unobtrusive as possible." *Id.* at 988-989.

So long as the remedy available in judicial review of zoning decisions that are preempted by Section 332(c)(7)(B) is limited to an injunction, local governments can continue to assert their zoning authority consistent with congressional intent. But, under the rule announced by the Ninth Circuit in this case, judicial review would be augmented by claims for damages and attorneys' fees. Such a rule would tie the hands of local governments. As *amici* noted in a brief filed with this Court urging the grant of certiorari in this case, one not atypical case recently settled in California for $250,000 threatened attorneys' fees liability of $640,000—nearly 0.5% of the municipality's annual budget—under the Ninth Circuit rule. Local Gov't Cert.-Stage Br. 19.

This result is antithetical to Congress's intent. In the context of Section 253, Congress expressed concern for the costs that would be imposed on local governments to "travel frequently to Washington, D.C., to defend their actions before the FCC." *Qwest Corp.*, 224 F. Supp. 2d at 1315 (citing 141 CONG.

REC. S8170 (daily ed. June 12, 1995) (statement of Sen. Feinstein); *id.* at S8306, S8308 (daily ed. June 14, 1995) (statement of Sen. Gorton)). "Requiring governments to pay their opponent's attorneys' fees pursuant to Section 1983 and 42 U.S.C. § 1988 whenever a court determines that local laws are preempted would upset this delicate balance" and violate congressional intent. *Qwest Corp.*, 224 F. Supp. 2d at 1315-1316. Likewise, under Section 332(c)(7)(B)(v), it is unrealistic to impute to a Congress concerned about burdening local governments even with travel expenses an intent to impose the much larger expense of damages and attorneys' fees.

Contrary to this congressional concern for local governments' costs, the necessary result of affirming the Ninth Circuit's ruling would be greatly to encourage municipalities to grant permits to construct cell-phone towers, despite the legitimate concerns of zoning boards and citizens. The result is exacerbated by the one-sided attorneys' fees scheme under Section 1988: only those challenging a permit denial under Section 332(c)(7)—not local governments defending decisions not to grant a permit, and not citizens opposing permits—may seek attorneys' fees if successful. Although the Seventh Circuit thought it a "gross[] overstate[ment]" to imagine a "forest of cell-phone towers" (*Primeco*, 352 F.3d at 1151), the one-sided incentives under the Ninth Circuit rule threaten just that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE AMERICAN PLANNING ASSOCIATION, AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the limits on state and local zoning and land-use authority established by 47 U.S.C. § 332(c)(7)(B) can be enforced through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

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American Law Institute, *A Model Land Development Code* (1975)	*passim*
W. Blackstone, *Commentaries* (1783)	14
Josh Cohen, *Supreme Court to Hear City's Antenna Case*, Palos Verdes Peninsula News, (Oct. 1, 2004) (available at http://pvnews.nminews.com/articles/2004/10/01/local_news/news1.txt)	22
Nick Green, *High Court to Rule on RVP Tower Issue*, The Daily Breeze (Sept. 29, 2004)	22
H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996)	*passim*

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Michael Kao, *Calculating Lawyers Fees: Theory and Reality*, 51 UCLA L. Rev. 825 (2004)	22
Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in American Planning Association, *Modernizing State Planning Statutes* (1996)	9
The Municipal Year Book (2004)	21
Patrick J. Rohan, *Zoning and Land Use Controls* (2004)	*passim*
U.S. Dep't of Commerce, *A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations* (1926)	9, 14
U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook* (2004)	24
Kenneth H. Young, *Anderson's American Law of Zoning* (4th ed. 1997 & 2004 Supp.)	10, 11, 12, 16

INTEREST OF THE *AMICI CURIAE*

Amici National League of Cities, National Association of Counties, International City/County Management Association, National Conference of State Legislatures, Council of State Governments, International Municipal Lawyers Association, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1]

Amicus National Association of Telecommunications Officers and Advisors (NATOA) has represented the telecommunications needs and interests of local governments for over 20 years. NATOA advises individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Amicus American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. With more than 34,000 members nationwide, APA has a longstanding policy interest and involvement in the federal legislative debate concerning the Telecommunications Act to ensure that communities remain empowered to make appropriate, necessary, and citizen-driven decisions about telecommunications infrastructure.

All of the *amici* have a compelling interest in the issue presented in this case: whether Congress intended that the remedy provided in 47 U.S.C. § 332(c)(7)(B)(v) for challenging wireless facility zoning or permitting decisions that allegedly violate § 332 be exclusive or whether such challenges can be brought under 42 U.S.C. § 1983. While Con-

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[1] The parties have consented to the filing of *amicus curiae* briefs in this case and have filed blanket consent letters with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

gress imposed certain federal standards on wireless facility zoning and permitting decisions, it did so in a manner that is highly deferential to state and local government review processes. For example, while Congress created a right of judicial review, it imposed the same 30-day limitations period that exists in most States. Moreover, Congress adopted the same standard of judicial review that is used by state courts reviewing local land use decisions. Section 1983 suits are fundamentally incompatible with the remedial scheme Congress created in § 332(c)(7)(B).

The court of appeals' holding that § 1983 suits nonetheless are available to challenge local wireless facility zoning and permitting decisions undermines the scheme Congress created in § 332(c)(7)(B) and will disrupt the state and local zoning review process. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. Section 332(c)(7), entitled "Preservation of local zoning authority," is designed to facilitate the rollout of wireless service in a way that is respectful of existing state and local zoning processes. Congress achieved this balance by adopting traditional state-law principles and limitations governing judicial review of zoning determinations. For example, Congress provided that a person seeking judicial review of any final action or failure to act by a state or local government must commence an action "within 30 days." 47 U.S.C. § 332(c)(7)(B)(v). This 30-day limitation is derived from the Standard State Zoning Enabling Act of 1926, which was adopted by all 50 States and remains in effect in modified form in 47 States. Most States impose a relatively short time limit on persons seeking judicial review of zoning decisions, and 30 days is the most common state-imposed limit. Congress determined that the same 30-day requirement should apply when a challenge to a local zoning or permitting decision is based on the federal standards of § 332(C)(7)(B).

The provision of § 332(c)(7)(B)(v) that judicial review is available for "final" actions of state or local governments parallels similar "final agency action" requirements for judicial review of zoning decisions under state law. Likewise, the requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii), also follows typical state-law requirements governing judicial review of zoning decisions.

The Court has recognized that when a federal statute does not expressly authorize particular remedies, it is presumed that court are authorized to award any *appropriate* relief. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 73 (1992). Congress' decision to adopt the existing framework for state judicial review of zoning decisions strongly indicates that the appropriate remedies for violations of the standards of § 332(c)(7)(B) are those generally available when a court reviews a zoning decision under state law. Consistent with traditional appellate review of agency action, those remedies may include injunctive or declaratory relief setting aside or modifying the administrative decision, but not damages or attorney's fees. Indeed, most States grant local governments and municipalities immunity from damages liability for zoning decisions. Those grants of immunity should be respected under the 1996 Act's saving clause, which provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ." 47 U.S.C. § 152 (note).

2. Allowing suits under 42 U.S.C. § 1983 would upset the careful balance struck by Congress in the 1996 Act. If § 1983 actions are available to redress violations of the federal standards of § 332(c)(7)(B), then the 30-day limi-

tations period is ineffective, because plaintiffs would have up to four years to commence an action under § 1983. *See* 28 U.S.C. § 1658. In addition, if § 1983 actions are available private parties may obtain damages and attorney's fees awards under 42 U.S.C. § 1988, neither of which are available under § 332(c)(7)(B)(v). There is persuasive evidence that Congress did not intend to saddle local and state governments with this liability.

The practical consequences of allowing § 1983 actions could be significant. There are thousands of counties, municipalities, and townships in the United States, including many with few inhabitants, limited financial resources, and no full-time counsel. Faced with the threat of large claims for attorney's fees and damages by well-financed corporations represented by high-priced counsel, local governments may be deterred from vigorously protecting visual, aesthetic, and safety concerns. Such a result would defeat Congress' intention to allow local governments to retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996).

This Court's decisions point towards reversal of the court of appeals' decision in this case. Where this Court has held that § 1983 actions are available, the federal statute that creates the federal rights at issue has not expressly provided individuals with a private right of action to vindicate those rights. In contrast, where Congress has expressly provided for a private right of action in the statute that creates the federal rights at issue, this Court has held that actions under § 1983 are foreclosed. In enacting § 332(c)(7), Congress created an express private right of action that parallels the judicial review of zoning and permitting decisions that is traditionally available under state law. In these circumstances, allowing resort to § 1983 would contravene the intent of Congress.

ARGUMENT

In the Telecommunications Act of 1996, Congress imposed federal standards on local zoning authorities' "decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Substantively, Congress prohibited local zoning authorities (1) from "unreasonably discriminat[ing] among providers of functionally equivalents services" (*id.* § 332(c)(7)(B)(i)(I)); (2) from "prohibit[ing] . . . the provision of personal wireless services" (*id.* § 332(c)(7)(B)(i)(II)); and (3) from regulating the placement, construction, and modification of personal wireless service facilities based on "the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations" (*id.* § 332(c)(7)(B)(iv)). Procedurally, Congress required zoning authorities (1) to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time, . . . taking into account the nature and scope of the request" (*id.* § 332(c)(7)(B)(ii)) and (2) to ensure that decisions "deny[ing] a request . . . be in writing and supported by substantial evidence contained in a written record" (*id.* § 332(c)(7)(B)(iii)).

The 1996 Act expressly provides private parties with "a mechanism for judicial relief from zoning decisions that fail to comply with" these requirements. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996). Specifically, 47 U.S.C. § 332(c)(7)(B)(v) allows "[a]ny person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with [the federal standards listed above], within 30 days after such action or failure to act, [to] commence an action in any court of competent jurisdiction." Congress viewed such actions as "appeal[s]" of "final" zoning and permitting decisions (H.R. Conf. Rep. No.

458, *supra*, at 209), and required courts to "hear and decide [them] on an expedited basis" (47 U.S.C. § 332(c)(7)(B)(v)).[2]

Despite Congress' decision to provide a specific avenue for private parties to seek judicial enforcement of these federal standards via § 332(c)(7)(B)(v), the court of appeals held that private parties can enforce the same federal standards under 42 U.S.C. § 1983 as well. The court ruled that § 1983 actions are cognizable (and § 1983 remedies are available) because § 332(c)(7)(B)(v)—the very "mechanism for judicial relief" (H.R. Conf. Rep. No. 458, *supra*, at 208) that Congress chose to include in the 1996 Act—"does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs[,]" and "grants no remedies beyond procedural rights." Pet. App. at 5a, 6a. The court further reasoned that § 332(c)(7)(B)(v)'s 30-day limitations period "imposes a burden on an aggrieved plaintiff, not a benefit" and that "[t]he only benefit to an aggrieved plaintiff is expedited judicial review," which "does nothing to remedy a TCA violation in itself." *Id.* at 8a-9a.

In so holding, the court of appeals misconstrued the scope and effect of § 332(c)(7)(B)(v), as well as Congress' intent in the 1996 Act to minimize disruption to state and local zoning decisions. As *amici* will show, the judgment below should be reversed for two reasons. *First,* examination of the text, structure, and legislative history of the Act confirms that Congress designed § 332(c)(7)(B)(v) to provide for judicial review of wireless facility zoning and permitting decisions that parallels, in terms of timing, scope, and remedies, the review that is available in nearly every State for zoning and permitting decisions. Contrary to the views of the court of

[2] The Act further allows persons who claim a local zoning authority's decision was impermissibly based on radio frequency emissions the option of petitioning the Federal Communications Commission or a court for relief. 47 U.S.C. § 332(c)(7)(B)(v).

appeals, § 332(c)(7)(B)(v) authorizes courts to order appropriate remedies, such as declaratory and injunctive relief, upon a determination that a local zoning authority's decision fell afoul of the 1996 Act's requirements. *Second*, allowing private parties to sue under § 1983, and thereby circumvent the prescribed limits on § 332(c)(7)(B)(v) actions, upsets Congress' carefully designed scheme; could have significant, negative consequences for local governments that Congress sought to avoid; and is contrary to this Court's precedents on the availability of § 1983 remedies.

I. SECTION 332(C)(7)(B)(V) PROVIDES FOR JUDICIAL REVIEW OF WIRELESS FACILITY ZONING DECISIONS THAT IS ANALOGOUS TO THE REVIEW TRADITIONALLY AVAILABLE FOR STATE AND LOCAL ZONING DECISIONS.

With § 332(c)(7)(B), Congress sought to facilitate the rollout of wireless service in a manner that is respectful of existing state and local zoning processes. Section 332(c)(7) is entitled "Preservation of local zoning authority." *See also* H.R. Conf. Rep. No. 458, *supra*, at 208 (Congress did not intend "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decisions."). Other than the non-discrimination and procedural requirements that are set forth in § 332(c)(7)(B) and described above, Congress disavowed any intent to "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A); H.R. Conf. Rep. No. 458, *supra*, at 207-08 (1996 Act "preserves the authority of State and local governments over zoning and

land use matters except in the limited circumstances set forth" in § 332).[3]

A. Congress Patterned § 332(7)(B)(v) After State Review Mechanisms.

The judicial review provision of § 332(c)(7)(B)(v) reflects Congress' deferential stance toward state and local zoning processes. Strikingly, both it and § 332(c)(7)(B)(iii)'s requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record" parallel requirements contained in state enabling acts that create, and define the scope of, private parties' rights to obtain judicial review of zoning determinations in state court.

1. *Section 332(c)(7)(B)(v) follows the lead of most States and the Standard State Zoning Enabling Act in restricting the time for seeking judicial review to 30 days.*

The court of appeals characterized § 332(c)(7)(B)(v) as establishing a "short" statute of limitations for review of local zoning authority decisions. Pet. App. 5a. But Congress did not select the 30-day limitations period from thin air. Thirty-day limits have a venerable provenance in early zoning law and continue to be widely used in state zoning law review schemes.

"Statutes and ordinances prescribing the time limitations to initiate judicial review are often patterned after the Standard State Zoning Enabling Act," which was adopted in final form

[3] A House amendment to the bill would have required the FCC to issue specified siting regulations and to create a "negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries . . . to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites." H.R. Conf. Rep. No. 458, *supra*, at 207. This amendment was rejected by the conferees in favor § 332's more deferential approach to existing land use processes. *Id.*

in 1926 and published by the U.S. Department of Commerce. 8 Patrick J. Rohan, *Zoning and Land Use Controls* § 52.04[2] (2004) (footnote omitted).[4] Section 7 of the Zoning Enabling Act authorized the appointment of boards of adjustment to decide such matters as appeals from administrative orders and requests for special exceptions and variances. *See* U.S. Dep't of Commerce, A Standard State Zoning Enabling Act, *supra*, at 9-11. Section 7 provided that "[a]ny person . . . aggrieved by any decision of the board of adjustment . . . may present to a court of record a petition . . . setting forth that such decision is illegal . . . . Such petition *shall be presented to the court within 30 days after the filing of the decision in the office of the board.*" *Id.* at 11 (emphasis added).

The Zoning Enabling Act was subsequently "adopted by all 50 states and is still in effect, in modified form, in 47 states." Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History* 3, in 1 American Planning Association, *Modernizing State Planning Statutes* 3 (1996). When the American Law Institute published its Model Land Development Code, it

> "suggest[ed] 4 weeks as a reasonable time in which to commence legal proceedings to challenge the validity of orders issued by a Land Development Agency. Most states that currently provide for statutory judicial review

[4] The Act was the product of a committee of leading lawyers, engineers, and housing and planning experts, which was appointed by then Secretary of Commerce Herbert Hoover. *See* U.S. Dep't of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (1926). The Act's principal drafter was Edward M. Bassett, an attorney who was instrumental in the creation of New York City's "pioneering zoning code in 1916." Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History* 1, in 1 American Planning Association, *Modernizing State Planning Statutes* 1 (1996).

of local administrative zoning decisions prescribe a 30 day time period for such actions to be initiated."

Model Land Dev. Code § 9-107, at 423 (Reporters Note) (1975). *See also id.* § 9-107(1), at 422 ("The validity of an order of a Land Development Agency granting or denying development permission or an enforcement order shall not be questioned in any legal proceeding commenced more than [4 weeks] after notice of the order was given. . . ."). Even today, while "[t]he time restrictions range from 10 to 60 days, most require[e] that proceedings be commenced within 30 days of the decision in issue." 4 Kenneth H. Young, *Anderson's American Law of Zoning* § 27.24, at 572 (4th ed. 1997 & 2004 Supp.). *See, e.g.*, Del. Code Ann. Tit. 22, § 328(a) (30 days); Fla. Stat. Ann. § 120.68(2)(a) (same); N.Y. Town Law § 267-c (same); N.C. Gen. Stat. § 160A-381 (same); Pa. Stat. Ann. Tit. 53, § 11002-A (same).

2. ***Section 332(c)(7)(B)(v)'s requirement that State or local government action be "final" as a condition of review accords with typical state requirements for zoning decision review.***

Similarly, Congress' decision to restrict judicial review to "final" state or local government decisions emulates state judicial review provisions. Nearly every state review scheme is identical, in that virtually all allow parties "aggrieved" or "affected" by a "final" state administrative zoning or permitting decision to challenge the decision in court. *See, e.g.*, Haw. Rev. Stat. § 91-14(a); 55 Ill. Comp. Stat. Ann. § 5/5-12012; Ky. Rev. Stat. § 100.347(1); N.H. Rev. Stat. Ann. § 677:4; N.M. Stat. Ann. § 3-21-9; Tenn. Code Ann. § 27-9-101. That Congress chose to follow the state-law model for challenges to wireless facilities zoning decisions demonstrates its intent to preserve the integrity of local zoning and permitting processes, while ensuring that private parties have an effective method of securing compliance with federal

standards through judicial actions under § 332(c)(7)(B)(v). The particular balance Congress struck in this regard was carefully considered. *See* H.R. Conf. Rep. No. 458, *supra*, at 208 (rejecting alternative that aggrieved parties must exhaust any "independent State *court* remed[ies]," in addition to obtaining "final administrative action at the State or local government level" before commencing an action under § 332(c)(7)(B)(v)) (emphasis added).

3. ***Section 332(c)(7)(B)(iii)'s requirement that decisions denying requests be "in writing and supported by substantial evidence contained in a written record" replicate zoning review standards used throughout the States.***

Congress' decision to require that zoning decisions be "in writing and supported by substantial evidence contained in a written record" (47 U.S.C. § 332(c)(7)(B)(iii)) also follows typical state review mechanisms. Most States apply the same standard. *See, e.g.*, Alaska Stat. § 29.40.060(b); N.M. Stat. Ann. § 39-3-1.1(D)(2); Utah Code Ann. § 10-9-708(6); *see also Nevada Contractors v. Washoe Cty.*, 792 P.2d 31, 33 (Nev. 1990) (substantial evidence test).

The Conference Report for the 1996 Act confirms that Congress intended the "phrase 'substantial evidence contained in a written record'" to be construed as "the traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 458, *supra*, at 208. *See also id.* at 209 (describing § 332(c)(7)(B)(v) action as an "appeal" of state or local administrative decision). As contemplated by Congress, the scope of judicial review under § 332(c)(7)(B)(v) parallels certiorari review of administrative zoning boards in state courts. *See Anderson's American Law Of Zoning*, *supra*, § 27.07, at 507 (The "writ is traditionally confined to the review by a judicial tribunal of a decision of an inferior tribunal, on the record made by the latter."). As another authority explains, "[a] challenge to a quasi-judicial deter-

mination brought by way of certiorari or appeal is similar to the appeal of a judicial decision to a higher court. The appellate court will, of course, correct any errors of law by the lower tribunal." Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[3].

Moreover, the appellate court will overturn a board's decision where it "has failed to follow procedures required by state statutes or its own prescribed procedures." *Id.* (footnote omitted). A reviewing court, however, "will not weigh the evidence but will examine the record to determine whether there is any legal or competent evidence in the record to support the decision." *Anderson's American Law Of Zoning*, *supra*, § 27.30, at 614 (footnotes omitted). As a leading authority explains:

> In the instance that the board's decision is supported by 'substantial evidence' the board will be generally upheld. . . . .[A]s a rule the courts limit their inquiry of the administrative record to ascertain that the zoning board decision was neither irrational nor clearly erroneous. It is in fact error for the trial court to amplify its review beyond such findings.

Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[2] (footnotes omitted). *See also Anderson's American Law Of Zoning*, *supra*, § 27.30, at 610-11 & n.45 ("While a court reviewing a decision of a board of adjustment may not substitute its judgment for that of the board, it will examine the record upon which the board's decision is based to determine whether the findings of the board are supported by substantial evidence.") (footnotes omitted); Model Land Development Code, § 9-110(1) & (f), at 422 (A "court may declare the order . . . invalid . . . if it determines that . . . the order is not based on findings of fact which are supported by substantial evidence.").

Likewise, the commentary to the Model Land Development Code explains, "[i]f findings of fact were made by a

prior administrative agency, the courts are not free to disregard the weight given the evidence by the agency." *Id.* at 433. *Accord Pacifica Corp v. City of Camarillo*, 149 Cal. App.3d 168, 178 (Ct. App. 1983); *Education Dev. Center, Inc. v. West Palm Beach Zoning Bd. of Apps.*, 541 So.2d 106, 108 (Fla. 1989); *Turner v. Hammond*, 310 A.2d 543, 553 (Md. 1973); *Younger v. City of Portland*, 752 P.2d 262, 263 (Or. 1988).

B. Section 332(c)(7)(B)(v) Allows Private Parties To Obtain Federal Remedies That Are Consistent With Congressional Intent.

As the foregoing discussion demonstrates, Congress provided for judicial review in § 332(c)(7)(B)(v) that mirrors the review process for zoning decisions that is widely used throughout the States. The court of appeals acknowledged that § 332(c)(7)(B)(v) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction." Pet. App. 6a. But the court nonetheless concluded that § 332(c)(7)(B)(v) "does not provide for any type of relief." *Id.* at 7a. In its view, "[t]he only benefit to an aggrieved plaintiff [in § 332(c)(7)(B)(v)] is expedited judicial review," which "does nothing to remedy a TCA violation in itself." *Id.* at 8a-9a. The lower court's interpretation of § 332(c)(7)(B)(v) is contrary to all indicia of congressional intent and common sense.

1. *Declaratory and injunctive relief are available in actions brought under § 332(c)(7)(B)(v).*

Contrary to the view of the court of appeals, it is of no consequence that § 332(c)(7)(B)(v) does not itemize the remedies available to private parties for a violation of federal standards. As this Court has long recognized, "[t]hat a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms

authorize execution to issue on a judgment.'" *Franklin v. Gwinett County Pub. Schs.*, 503 U.S. 60, 68 (1992) (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). Rather, there is a "traditional presumption in favor of any *appropriate relief* for violation of a federal right." *Franklin*, 503 U.S. at 73 (emphasis added). *See also* 3 W. Blackstone, *Commentaries* 23 (1783) (quoted in *Franklin*, 503 U.S. at 66) (It is "'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'")).

"[A]ppropriate relief," within the meaning of *Franklin*, includes "forms of relief traditionally available in [analogous] suits." *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). Congressional intent remains the touchstone for determining what relief is "appropriate." *See Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 285 (1998) (general rule that all "appropriate relief" is available "must be reconciled with congressional purpose" of the statute); *id.* at 284 (consideration of "the statutory structure and purpose" is "pertinent . . . to [determination of] the scope of the available remedies").

Errors in state zoning decisions are typically remedied by relief setting aside or modifying the order of the lower tribunal. The Model Land Development Code states:

> "[T]he Court may, in a proceeding involving an order, affirm the decisions of the agency, set aside the order, remand the matter for further proceedings before the agency in accordance with directions contained in the opinion or order of the Court, or enter an order that might have been entered by the agency issuing the order and that the court could order the agency to issue."

Model Land Dev. Code, *supra*, § 9-111(2), at 434. *See* Standard State Zoning Enabling Act, *supra*, § 7, at 12 ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."); Rohan, *Zoning & Land Use Controls*, *supra*, § 52.05[3] ("A court will overturn a

zoning determination which is beyond the ambit of the board's legislatively prescribed powers . . ., or where the lower tribunal has failed to follow procedures required by state statutes or its own prescribed procedures.") (footnotes omitted).

Nearly every state zoning review scheme provides for the same specific remedies.[5] Given Congress' decision to pattern § 332(c)(7)(B)(v) after these state models, § 332(c)(7)(B)(v) clearly embraces these traditional remedies.

Indeed, the district court had little problem fashioning a comprehensive remedy for the violation of federal right which it found to have occurred in this case. Respondent obtained complete relief when the district court enjoined the city council "to set aside its earlier resolution denying [respondent's] application" and ordered it "to adopt a new

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[5] *See, e.g.*, Cal. Gov. Code § 65009(c)(1)(E) (authorizing suit "[t]o attack, review, set aside, void, or annul any decision" on applications for conditional use permits and variances made by a zoning board of adjustment or zoning board of appeals, "or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit"); Mich. Comp. Laws § 125.293a(3) ("the court may affirm, reverse, or modify the decision of the board of appeals"); N.Y. Town Law § 267-c(4) ("The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review determining all questions which may be presented for determination."); Or. Rev. Stat. § 197.850(9) ("The court may affirm, reverse or remand the order."); Pa. Stat. Ann. Tit. 53, § 11006-A(a) ("In a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal."); R.I. Gen. Laws § 45-24-69(d) ("The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision. . . ."); Tex. Local Gov't Code § 211.011(f) ("The court may reverse or affirm, in whole or in part, or modify the decision that is appealed."); Wash. Rev. Code § 36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings.").

resolution granting . . . a Conditional Use Permit" subject to "reasonable conditions." Pet. App. 14a. A federal court order that sets aside a local government's zoning determination on the ground that it violates federal law and further commands local officials to grant a conditional use permit subject to certain conditions is not merely "procedural." *Id.* at 9a (Ct. App. Op). Quite the opposite, the district court's order "remed[ies] a TCA violation in itself." *Id.* at 8a-9a

2. *Damages and attorney's fees are not "appropriate relief" under § 332(c)(7)(B)(v) and would contravene Congress' unambiguous intent not to modify, impair, or supersede state and local immunity laws.*

Violations of § 332(c)(7)(B) occur as a result of the exercise of a quasi-judicial function. *See* Rohan, *Zoning & Land Use Controls*, *supra*, at § 52.01 (noting "the adjudicatory power to enforce [zoning] ordinances and to grant or deny, on an individual basis, permits, exceptions, nonconforming uses and variances under the ordinances"). As explained above, *see supra* pp. 11-12, "[a]ppeal and certiorari are the usual avenues of review open to a party aggrieved by the quasi-judicial decision of zoning boards." Rohan, *Zoning & Land Use Contols*, *supra*, § 52.05[1]. *See also Anderson's American Law Of Zoning*, *supra*, § 27.07, at 507 ("the writ of certiorari is probably the most common device for reviewing the decisions of administrative boards"); *id.* at 27.06, at 504 ("The courts are in apparent agreement that a decision of a legislative body is subject to review by certiorari or appeal where such decision is an administrative or quasi-judicial one."). Moreover, "[a] challenge to a quasi-judicial board determination brought by way of certiorari or appeal is similar to the appeal of a judicial decision to a higher court." Rohan, *Zoning & Land Use Controls*, *supra*, at § 52.05[3].

Just as a trial court's ruling that violates a party's rights does not give rise to damages when it is overturned on appeal,

damages are traditionally unavailable where a board of adjustment or city council has incorrectly denied a permit, special use exception or request for a variance. *See*, *e.g.*, *Torromeo v. Town of Fremont*, 813 A.2d 389, 392 (N.H. 2002). ("[Q]uasi-judicial . . . acts of a town ordinarily do not subject it to claims for damages. . . . [P]laintiffs are not entitled to damages, and . . . their only remedy is issuance of the erroneously-denied building permits.") (internal quotation and citation omitted). Consistent with the "American Rule," *see Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), attorney's fees generally are not recoverable either. Consequently, neither damages nor attorney's fees would constitute "appropriate relief" in actions brought under § 332(c)(7)(B)(v). *See Barnes*, 536 U.S. at 187; *Gebser*, 524 U.S. at 285.

Interpreting § 332(c)(7)(B)(v) not to allow damages and attorney's fee recoveries is also required by Section 601(c)(1) of the 1996 Act. *See* 47 U.S.C. § 152 (reprinting Section 601(c)(1) in historical and statutory notes). In that provision, Congress admonished that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided. . . ." Most States by statute grant local governments immunity from damages liability for zoning decisions.[6] If damages and fee-shifting were deemed available under § 332(c)(7)(B)(v), those "State [and] local law[s]" would, contrary to Section 601(c)(1), be "impair[ed] or supersed[ed]" by the 1996 Act in the absence of an "express[]" provision.[7]

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[6] *See, e.g.*, Ala. Code § 11-47-190; Cal. Gov. Code § 818.4; Del. Code Ann. Tit. 10, § 4011(a)(2); Idaho Code § 6-904B(3); Or. Rev. Stat. § 30.265(3)(c); S.C. Code Ann. § 15-78-60(1) & (2); Tenn. Code Ann. § 29-20-201.

[7] Any conclusion that damages and attorney's fees are appropriate relief under § 332(c)(7)(B)(V) would rest on the implausible premise that

II. INTERPRETING THE 1996 ACT TO ALLOW SUITS UNDER § 1983 WOULD UPSET CONGRESS' CAREFULLY CHOSEN ENFORCEMENT SCHEME AND RUN COUNTER TO *SEA CLAMMERS* AND ITS PROGENY.

The Ninth Circuit reasoned that actions to enforce § 332(c)(7)(B)'s requirements with respect to zoning decisions are cognizable under § 1983 because § 332(c)(7)(B)(v)'s enforcement provisions do not contain a sufficiently "comprehensive" remedial scheme to overcome the "presumption" that respondent is entitled to § 1983 remedies. Pet. App. 4a-5a. In reaching this conclusion, the Ninth Circuit lost sight of the "crucial consideration" this Court has identified for determining whether § 1983 actions are available—"what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Allowing private parties to assert claims under § 1983 to enforce federal standards for wireless zoning and permitting decisions is fundamentally incompatible with Congress' desire to preserve existing state and local zoning processes and place limits on enforcement actions brought under § 332(c)(7)(B)(v). Cases such as *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), further support the conclusion that § 1983 actions are unavailable under § 332(c)(7).

Congress—while deferring to the traditional authority of state and local governments over zoning matters—nonetheless intended to subject their decisionmaking process to the extraordinary and unprecedented prospect of damages suits and fee shifting for merely misapplying federal law. Being subject to damages suits and fee shifting would create a strong incentive for local governments to abdicate their authority over the zoning and permitting of wireless facilities. Given the continued need of wireless service providers to expand their networks and build additional towers, the liability could be substantial in comparison to typical municipal budgets. *See*, *infra*, pp. 21-23 (discussing budgetary consequences for local governments of damages and fee awards).

A. Section 1983 Actions Are Fundamentally Inconsistent with the Mechanism for Judicial Relief That Congress Chose To Include in 1996 Act.

As discussed *supra*, pp. 8-13, Congress patterned § 332(c)(7)(B)(v)'s review provisions after those typically available under state law as part of its effort to facilitate provision of wireless services while minimizing disruption to existing zoning processes. If the door to § 1983 actions is opened to private parties that challenge wireless zoning and permitting decisions, important limits on § 332(c)(7)(B)(v) review would be circumvented, thereby frustrating congressional intent.

1. *Plaintiffs proceeding under § 1983 could circumvent the 30-day limitations period governing actions under § 332(c)(7)(B)(v) and prevent expedited judicial review.*

A key feature of § 332(c)(7)(B)(v) review is its 30-day limitations period. *See supra* pp. 8-10 (discussing the zoning law origins of the 30-day limit). This short limitations period reduces the amount of time local governments need worry about whether a particular zoning decision will be challenged and helps bring about swifter resolution of disputes. It is particularly beneficial to local governments as they deal with the proliferation of litigation concerning the scope of § 332(c)(7)'s substantive requirements. Lower courts have recognized that the statute "fairly bristles with potential issues." *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999). As wireless networks continue to expand in terms of geographic reach and competitors, the number of disputes continue to rise. *See* Pet. 26-28 (describing explosion of § 332(c)(7) litigation).

If § 1983 actions are available, however, plaintiffs "would be freed of the short 30-day limitations period and would

instead presumably have four years to commence the action." *Nextel Partners, Inc. v. Kingston Township*, 286 F.3d 687, 695 (3d Cir. 2002) (citing 28 U.S.C. § 1658).[8] In this same vein, it should be noted that parties to a § 1983 suit, unlike those in a § 332(c)(7)(B)(v) appeal, would not be entitled to have courts "hear and decide [the] action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The consequences would be significant. Permitting challenges to zoning decisions to be filed up to four years after the fact and dispensing with expedited review would deprive local governments of the certainty afforded by § 332(c)(7)(B)(v)'s speedier processes. Furthermore, it would delay local zoning authorities' receipt of timely, much-needed guidance from courts about how to comply with § 332(c)(7). If private parties can invoke § 1983's generous time-frame, local government decision-makers may not learn that they have a good-faith but erroneous view of § 332(c)(7) until many years, and many other similarly mistaken decisions, later.

Resulting delays in obtaining final judgments—whether from a longer limitations period or slower judicial decision-making—can harm local governments and the public. Such delays will slow the roll-out of personal wireless facilities and increase the adverse fiscal consequences that § 1983 damages and § 1988 attorney's fee liability poses to local governments.

[8] Section 1658 provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." Last Term, this Court held that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations period—if the plaintiff's claim was made possible by a post-1990 enactment." *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836, 1845 (2004). A § 1983 action brought to enforce rights secured by § 332(c)(7)(B) is "made possible by" § 332(c)(7)(B), a post-1990 enactment.

2. *Plaintiffs proceeding under § 1983 could subject local governments to monetary judgments and attorney's fee awards.*

Allowing private parties to bring § 1983 suits to enforce § 332(c)(7) would also allow litigants to seek monetary damages and attorney's fee awards, neither of which are available under § 332(c)(7)(B)(v). As discussed above, all available indicia of legislative intent strongly suggest that Congress affirmatively did *not* wish to saddle local governments with potential liability for damages and attorney's fees for zoning and permitting decisions. In addition to these indicia of congressional intent, it is worth considering the real-world consequences that are likely to follow from a judicial decision to expose local governments to liability for damages and attorney's fees under §§ 1983 and 1988.

There are thousands of local governments that potentially would be affected by a decision holding them liable under § 1983 for violations of zoning and permitting requirements under the 1996 Act. *See The Municipal Year Book* xi (2004) (reprinting 2002 U.S. census data regarding number of county and municipal governments). The vast majority of these jurisdictions have less than 50,000 inhabitants. *Id.* at xii-xiii. Many do not have full-time counsel or significant financial resources.

Damages and attorney's fees awarded under § 1983 would reduce the amount these local governments otherwise would spend on services for their communities, such as police and fire protection, infrastructure, and general services. Governments would pay either directly, from their general revenue, or indirectly, through increased insurance premiums or contributions to insurance alternatives, such as municipal liability pools.

A recent survey of attorney's fee awards in California civil rights cases found that federal courts awarded attorney's fees

at an average billable rate of $253.44 per hour. Michael Kao, *Calculating Lawyers Fees: Theory and Reality*, 51 U.C.L.A. L. Rev. 825, 841 (2004). Moreover, in four of the sixteen federal cases reviewed in the survey, the fee award exceeded $290,000. *Id.* at 840-41. Attorney's fees in civil rights cases can substantially exceed the monetary damages awarded to plaintiffs. *See City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986) (upholding fee award of $245,456 where plaintiff recovered total damages of $33,350). Substantial attorney's fees are also awarded in cases involving declaratory and injunctive relief.[9]

If anything, these figures likely understate the potential amounts involved in § 332(c)(7) disputes. Typical plaintiffs in these suits are large telecommunications companies who hire sophisticated counsel and have the resources to litigate aggressively. Even though Respondent does not fit this mold, the potential damage and fee amounts in this case are staggering. *See* Josh Cohen, *Supreme Court to Hear City's Antenna Case*, Palos Verdes Peninsula News, Oct. 1, 2004, (Respondent "told the *News* that 'based upon attorney's fees, court costs and the loss of my revenue,' the court could grant him upward of $15 million"), *available at* http://pvnews.nminews.com/articles/2004/10/01/local_news/news1.txt. *See also* Nick Green, *High Court to Rule on RVP Tower Issue*, The Daily Breeze, Sept. 29, 2004, at 1 (reporting that Respondent "said he is seeking more than $3 million").

Given their often razor-thin budgets, many local governments may conclude that visual, aesthetic, and safety

[9] To place such awards in context, police officers and sheriff's deputies had median annual base earnings of $42,270 in 2002, and firefighters approximately $36,000 during the same time period. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, (2004), *available at* http://stats.bls.gov/oco/ocos160.htm & http://stats.bls.gov/oco/ocos158.htm.

concerns are not worth fighting for in view of the threat of a damages or fee award being entered against them. Such a result would undermine Congress' intent to leave authority for local zoning decisions in the hands of state and local governments and compromise local governments' ability to protect their citizens. *Cf.* H.R. Conf. Rep. No. 458, *supra*, at 208 (expressing intent that municipalities retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements").

B. This Court's Precedents Further Demonstrate That § 1983 Remedies Should Not Be Engrafted Onto The 1996 Act.

The court of appeals interpreted this Court's decisions in cases such as *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418 (1987), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to support its conclusion that § 1983 remedies were available. See Pet. App. 3a-12a. In fact, this Court's decisions support the opposite result. In no case where Congress expressly created a private right of action against state officials has the Court held that a § 1983 remedy is available.

Most of this Court's cases addressing whether private parties have a cause of action under § 1983 did not involve statutory schemes closely analogous to the scheme at issue here. In several cases, the Court examined statutes that created enforceable federal rights, but did not, in contrast to § 332(c)(7)(B)(v), expressly provide individuals with the means to vindicate those rights in court. In each of these cases, the Court concluded that "'the availability of administrative mechanisms to protect the plaintiff's interests' " did not defeat the plaintiff's ability to seek judicial review via § 1983. *Blessing*, 520 U.S. at 347 (quoting *Golden*

State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).

For example, *Wright* examined an amendment to the United States Housing Act that gave petitioners, tenants living in low income housing, an enforceable right to pay rent commensurate with their income, but did not expressly provide petitioners with a cause of action to enforce the statutory limit. The court of appeals had inferred that Congress' failure to include a specific provision giving petitioners access to court while investing the Department of Housing and Urban Development with audit and budgeting authority indicated that petitioners had to rely on the Secretary to ensure compliance. *See* 479 U.S. at 428. This Court reversed, holding that provisions granting an administrator "generalized [auditing and oversight] powers [were] insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Id.* at 428.

Likewise, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990), examined the Medicaid Act, which "contain[ed] no . . . provision for private judicial or administrative enforcement" of a hospital's statutory right to reasonable and adequate reimbursement rates. Again, the Court concluded that statutory provisions granting the Secretary of Health and Human Services general budget and oversight authority and requiring States to adopt certain administrative review schemes were not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522. *Blessing* similarly held that provisions of Title IV-D of the Social Security Act that granted the Secretary limited powers to audit and cut federal funding, but did not provide private parties with a private cause of action, did not create a remedial scheme "comprehensive enough to close the door on § 1983 liability" for violations of rights that were secured by the statute. 520 U.S. at 348. *Accord Golden State*, 493 U.S. at 108-09 (§ 1983 action available where

National Labor Relations Board "ha[d] no authority to address conduct protected by the NLRA against governmental interference" and no provision of the NLRA authorized private suits for that purpose); *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (same).

In stark contrast to *Wright*, *Wilder*, and *Blessing* are cases such as *Sea Clammers* and *Smith v. Robinson*, 468 U.S. 992 (1984). Both examined whether § 1983 remedies remained available to plaintiffs where the statutory scheme at issue, like § 332(c)(7) of the 1996 Act, expressly provided for a right of action to enforce federally-secured rights. In both cases, this Court found § 1983 actions foreclosed. *See also Wright*, 479 U.S. at 427 ("congressional intent to supplant the § 1983 remedy" is evidenced where "the statute[] at issue . . . provide[s] for private judicial remedies").

In *Sea Clammers*, plaintiff-respondent, an association of commercial fishermen, claimed that the Environmental Protection Agency and the Army Corps of Engineers allowed defendant-petitioners to dump pollutants in violation of Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 and caused its members to suffer $250 million in damages. *See* 453 U.S. at 5. Both "Acts contain[ed] unusually elaborate enforcement provisions" that allowed "private citizens" to "seek judicial review . . . of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants," and "citizen-suit provisions authoriz[ing] private persons to sue for injunctions," but not damages. *Id.* at 13-14 & n.24.

Looking at the statutory remedies as a whole, the Court "found it 'hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions.'" *Blessing*, 520 U.S. at 347 (quoting 453 U.S. at 200).

It "therefore concluded that the existence of these express remedies demonstrate[ed] . . . that [Congress] intended to supplant any remedy that otherwise would be available under § 1983" to enforce federal statutory claims. *Sea Clammers*, 453 U.S. at 21. As in this case, the absence of a provision expressly authorizing private parties to recover damages did not warrant a different result.

In *Smith* the Court confronted a similar issue: whether the existence of a statutory enforcement provision under the Education of the Handicapped Act (EHA) (20 U.S.C. §§ 1400 *et seq.*) precluded petitioners from seeking relief under § 1983 for a "constitutional deprivation[]" that was "virtually identical" to statutory claims redressable under the EHA. *Id.* at 1008-09. Although the EHA's judicial review provision did not state that it foreclosed § 1983 actions, the *Smith* Court nonetheless had "little difficulty concluding that Congress intended the EHA to be the exclusive avenue" for enforcement of claims "to a publicly financed special education." *Id.* at 1009. The Court's holding was based on the recognition that allowing § 1983 suits to proceed would bypass the carefully tailored statutory scheme Congress intended to ensure that children receive a free appropriate public education. *See id.* at 1011.

This case falls squarely within the *Sea Clammers-Smith* line of decisions. In enacting § 332(c)(7), Congress did not simply leave it to federal administrative officials to enforce its provisions. Rather, Congress expressly created a private right of action to challenge zoning decisions that violate the federal standards set forth in § 332(c)(7)(B). Congress' decision to provide in § 332(c)(7)(B) a "mechanism for judicial relief," H.R. Conf. Rep. No. 458, *supra*, at 208, that parallels, in terms of timing, scope, and remedies, the review that is available in nearly every State for zoning and

permitting decisions is conclusive evidence of its intent to foreclose resort to § 1983.[10]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[10] For the numerous reasons explained above, Congress intended that § 332(c)(7)(B)(v) provide the exclusive remedy for violations of §§ 332(c)(7)(B) (i)-(iv). There is thus no merit to the court of appeals' contention that the savings clause of the 1996 Act (Pub. L. No. 104-104, § 601, 110 Stat. 143, *reprinted in* 47 U.S.C. § 152 (note)) evidences congressional intent to preserve § 1983 remedies for violations of § 332(c)(7)(B). *See* Pet. App. 10a-12a. Recognizing the exclusivity of the § 332 remedy does not impair § 1983, as the latter remains available to redress violations of federal rights whenever Congress did not intend to foreclose its use. And as explained above at p. 17, authorizing damages actions for violations of § 332 would impair state laws denying damages liability and attorney's fees for erroneous zoning and permitting decisions.

(14)

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No. 03-1601

IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL.,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the availability of a right of action under a federal statute is, by itself, sufficient to demonstrate congressional intent to foreclose reliance on 42 U.S.C. § 1983 as a remedy for violations of the statute.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit advocacy organization with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues involving the protection of consumers and workers, public health and safety, and maintaining openness and integrity in government. One of Public Citizen's particular interests is ensuring that federal and state governments comply with laws that affect ordinary citizens. The ability of citizens to enforce those laws, including through the private right of action authorized in 42 U.S.C. § 1983, is vital to guaranteeing such compliance. The availability of the § 1983 right of action therefore significantly affects this interest.

Another of Public Citizen's principal concerns is the availability and affordability of legal services. Because prevailing parties in actions brought under 42 U.S.C. § 1983 are able to receive reasonable attorneys' fees under 42 U.S.C. § 1988(b), the availability of the § 1983 right of action significantly enhances their ability to obtain and afford legal representation. Public Citizen's attorneys have either represented parties or filed amicus briefs in a number of cases before this Court on attorneys' fees, including *Scarborough v. Principi*, 124 S. Ct. 1856 (2004), *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and *Kay v. Ehrler*, 499 U.S. 432 (1991).

Public Citizen's interest in this case is not specific to issues relating to the Telecommunications Act, and we have no view on the validity of the underlying Telecommunications

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[1] Letters of consent from both parties to the filing of this brief have been filed with the Clerk. This brief was not authored, in whole or in part, by counsel for a party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Act claim at issue in this case. But because the remedies provided for under the provision of the Telecommunications Act at issue are so limited, the assertion of the petitioners and the Solicitor General that they are "comprehensive" enough to render § 1983 unavailable would have potentially far-reaching consequences and could significantly limit the utility of § 1983 as a tool for remedying violations of federal law. Accordingly, we file this brief as amicus curiae in support of the respondent.

SUMMARY OF ARGUMENT

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that 42 U.S.C. § 1983 "encompasses violations of federal statutory as well as constitutional law." When a statute creates an enforceable right, violations of that statute can be remedied through the § 1983 right of action, unless the defendant can show, through "express provision or other specific evidence from the statute itself," that Congress intended to withdraw the remedy. *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987). This Court has inferred such an intent when the statute contains a "comprehensive" remedial scheme. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). The question in this case is whether a single clause of the Telecommunications Act, 47 U.S.C. § 332(c)(7)(B)(v), which provides a judicial right of action to enforce one subparagraph of the Act, is so "comprehensive" that it demonstrates congressional intent to preclude reliance on § 1983 and thus rebuts the presumption in favor of the § 1983 remedy.

The bare-bones right of action created by § 332(c)(7)(B) hardly qualifies as an enforcement "scheme" at all, let alone a comprehensive one. The sole means of enforcement in § 332(c)(7)(B) is in clause (v), which reads:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

These three sentences do not constitute an "elaborate enforcement" scheme, *Sea Clammers*, 453 U.S. at 13, such as those found in the cases in which this Court has inferred congressional intent to preclude reliance on § 1983.

Nor does the remedial scheme in § 332(c)(7)(B) exhibit an intent by Congress to fully occupy the remedial field. When Congress has been so vague about the scope of available remedies and so minimalistic in establishing procedural requirements, there is no basis for inferring that Congress created a carefully calibrated remedial scheme or intentionally limited other statutory remedies. Put differently, the question whether § 1983 is supplanted is one of congressional intent, *see Smith v. Robinson*, 468 U.S. 992, 1012 (1984), and the language of § 332(c)(7)(B)(v) gives no hint that Congress intended to foreclose access to presumptively available remedies.

Petitioners' argument boils down to an assertion that a private right of action within a statute, on its own, demonstrates congressional intent to preclude reliance on § 1983. In the cases in which this Court has found remedial schemes comprehensive, however, it has never relied just on the existence of a statutory private right of action. Instead, the Court has required that the statute's remedial scheme and § 1983 be *incompatible*. There is nothing incompatible about § 1983 and the statutory right of action here: Section 1983 neither provides remedies that Congress expressly foreclosed nor allows plaintiffs to bypass procedural limitations on the statu-

tory right of action, since the Telecommunications Act contains none (except for its 30-day limitations period, which, under 28 U.S.C. § 1658(a), is equally applicable to a § 1983 action). Because § 1983 and the statutory right of action coexist so compatibly, § 332(c)(7)(B)(v) does not "raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of ... rights secured by federal law." *Wright*, 479 U.S. at 425.

ARGUMENT

I. SECTION 332(c)(7)(B) DOES NOT CONTAIN THE SORT OF ENFORCEMENT SCHEME THIS COURT HAS FOUND SUFFICIENTLY COMPREHENSIVE TO PRECLUDE RELIANCE ON § 1983.

Section 1983 is a "generally and presumptively available remedy for claimed violations of federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). This Court does "'not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24 (quoting *Smith v. Robinson*, 468 U.S. at 1012). Only twice, in *Sea Clammers* and *Smith v. Robinson*, has the Court found a statute's remedial scheme sufficiently comprehensive to demonstrate congressional intent to foreclose reliance on § 1983.

In *Sea Clammers*, the Court found comprehensive the "unusually elaborate enforcement provisions," 453 U.S. at 13, of the Federal Water Pollution Control Act (FWPCA) and Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA). The FWPCA gave the Environmental Protection Agency Administrator "a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties." *Blessing v. Freestone*, 520 U.S. 329, 347 (1997). It also allowed interested persons to seek judicial review of various actions by the Administrator and contained citizen suit provisions authorizing only actions for injunctive relief

(and civil penalties payable to the government) and specifying various procedures that had to be followed in instituting such suits. *Sea Clammers*, 453 U.S. at 13-14. The Court found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created *so many* specific statutory remedies ...." *Id.* at 20 (emphasis added).

In *Smith v. Robinson*, the Court held that the Education of the Handicapped Act implicitly foreclosed a plaintiff from using § 1983 to assert a constitutional claim to a free special education. Like the statutes at issue in *Sea Clammers*, the EHA contained "an elaborate procedural mechanism." 468 U.S. at 1010. It incorporated significant parental involvement in educational placement decisions and contained a right to judicial review for aggrieved parties. In light of the comprehensiveness of this "carefully tailored administrative and judicial mechanism," *id.* at 1009, the Court inferred that Congress meant to foreclose a remedy under § 1983 for constitutional claims that paralleled the substantive requirements of the statute.[2] *Id.* at 1011.

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[2]Although *Smith v. Robinson* is often cited as if it concerned whether § 1983 could be used to assert statutory rights under the EHA, that issue was not presented: The plaintiffs in *Smith v. Robinson* expressly disclaimed any effort to "assert[] their [EHA] claim through the 'and laws' provision of § 1983." 468 U.S. at 1005. What the Court actually decided was that the EHA, rather than § 1983, was the exclusive means for asserting *constitutional* claims to a free and appropriate public education. Nonetheless, the Court's reasoning was broad enough to foreclose the use of § 1983 to assert a *substantive* claim to a free and appropriate public education based on the EHA: "We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Id.* at 1013. At the same time, however, the Court made clear that its holding did not necessarily foreclose the use of § 1983 to challenge the adequacy of state and local administrative *procedures* under the EHA, because such claims would not involve bypassing the extensive adminis-

(*Footnote continued*)

Section 332(c)(7)(B) does not even come close to containing the sort of enforcement scheme found to be comprehensive enough to foreclose resort to § 1983 in *Sea Clammers* and *Smith v. Robinson*. In contrast to the FWPCA and EHA, § 332(c)(7)(B) does not contain multiple enforcement options for both the federal government and private parties; it does not include detailed procedural mechanisms and guarantees; it does not delineate *any* administrative processes an aggrieved party must undergo before seeking judicial review; and it does not limit the nature of the judicial remedies available under the statute.

Instead, the subparagraph contains just three sentences on enforcement: The first sentence creates a right of action. The second specifies that the court should expedite the action. The third sentence provides that persons adversely affected by violations of § 332(c)(7)(B)(iv) may (but need not) also petition the FCC for relief (although it does not specify what relief the FCC may provide). Though the subparagraph involves the preservation of (and limits on) local zoning authority, it does not require the aggrieved party to resort to any particular administrative procedures before local government bodies prior to bringing an action to redress claimed violations. And although the section allows an aggrieved party to go to court, it does not expressly tailor the remedies that can be received to the harm that has been suffered. Indeed, the section says nothing at all about what remedies are available. In short, the enforcement "scheme" of § 332(c)(7)(B) is sparse, to say the least. The three brief sentences dealing with enforcement in § 332(c)(7)(B) do not constitute a comprehensive enough scheme to imply congressional intent to supplant § 1983.

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trative remedies available for *substantive* violations of the EHA and would therefore not necessarily be "inconsistent with the EHA's comprehensive scheme" even assuming that they could also be asserted in an action brought directly under the EHA itself. *Id.* at 1014 n.17.

This is not to say that Congress always needs to establish multiple, expansive remedies to demonstrate its intent to foreclose reliance on § 1983. A remedial scheme need not contain all the remedies offered by § 1983 to be sufficiently comprehensive to displace § 1983. In *Sea Clammers* itself, for example, the citizen-suit provision only allowed private persons to sue for injunctive relief, not for other remedies available under § 1983. What *is* required to displace § 1983 is evidence that Congress intended for the enforcement mechanisms it provided in the statute to fully occupy the remedial field. *See Wright*, 479 U.S. at 423 (describing the remedial scheme under consideration in *Sea Clammers* as a scheme that "left no room for additional private remedies under § 1983"). Thus, the very fact that the citizen-suit provision of the FWPCA limited the remedies available was evidence that Congress had considered all the various possible remedies and made a conscious decision to provide only for the ones that it thought would best suit its purposes. In such a circumstance, it could be inferred that Congress "provide[d] precisely the remedies it considered appropriate," *Sea Clammers*, 453 U.S. at 15, and did not intend for private parties to bypass remedial limits by turning to § 1983. Here, however, there is no evidence that Congress engaged in such considerations and made such decisions.

Petitioners focus extensively on the idea that, in creating the enforcement scheme in § 332(c)(7)(B)(v), Congress created a "specific and calibrated" remedy. Pet. Br. 15. Yet it is difficult to conclude that Congress created a carefully calibrated remedial scheme when the statute itself is completely silent about remedies. To be sure, the creation of a private right of action carries with it "all appropriate remedies unless Congress has expressly indicated otherwise," *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), and therefore private parties can receive remedies through the private right of action created by Congress in § 332(c)(7)(B)(v). The issue, however, is not whether reme-

dies would be available for violations of § 332(c)(7)(B) absent recourse to § 1983; rather, the question is whether Congress created a "carefully tailored scheme," *Smith*, 468 U.S. at 1012, that it intended to supplant all other remedies. The existence of a general background rule that applies when Congress has been silent does not demonstrate such intent on the part of Congress. It requires a great mental leap to assume that Congress engaged in a careful calibration of right and remedy, providing for exactly the remedies it wanted and excluding all others, while remaining absolutely silent on the topic. It makes much more sense to conclude that, in drafting § 332(c)(7)(B), Congress did not mean to define exactly what remedies it wanted to provide, but rather sought only to ensure, as the statute does on its face, that aggrieved persons can go to court and receive speedy relief of some kind.

II. A STATUTORY RIGHT OF ACTION, ON ITS OWN, DOES NOT PRECLUDE RELIANCE ON § 1983.

Apparently recognizing that § 332(c)(7)(B) lacks the ordinary hallmarks of comprehensiveness, petitioners (and the Solicitor General) argue that whenever a statute creates a judicial right of action it should be treated as "comprehensive" within the meaning of *Sea Clammers* and *Smith v. Robinson*. This Court has never held, however, that a judicial right of action, by itself, makes a statutory enforcement scheme sufficiently comprehensive to supplant § 1983. In particular, neither *Sea Clammers* nor *Smith v. Robinson* foreclosed resort to § 1983 solely because a statute contained a judicial right of action.

In *Sea Clammers*, the Court concluded that the enforcement scheme was comprehensive because of the "*many* specific statutory remedies, *including* the two citizen-suit provisions." *Sea Clammers*, 453 U.S. at 20 (emphasis added). Though the existence of the citizen-suit provisions was clearly important to the Court, it was not just the existence of those provisions, but the fact that there were "so many" statutory remedies, *id.*, that led the Court to conclude that Congress had intended to preclude reliance on § 1983. Nothing in *Sea Clammers* suggests that the Court would have found the bare existence of some right of action in court enough to erase the presumption that § 1983 is available to enforce statutory rights.

Smith v. Robinson made even clearer that the existence of a private right of action in a statute is not determinative of whether the statute's enforcement scheme is comprehensive (and thus exclusive). There, the Court concluded that Congress could not have intended for children with equal protection claims to a publicly financed special education to enforce their claims through § 1983 because "[a]llowing a plaintiff to circumvent the EHA *administrative remedies* would be inconsistent with Congress' carefully tailored scheme." *Smith*, 468 U.S. at 1012 (emphasis added). The "comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state education agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child" led the Court to conclude that Congress could not have intended to "leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Id.* at 1011. In other words, it was the statute's focus on the required procedures before the local and state education agencies, not just the judicial right of action that followed, that led the Court to find the scheme comprehensive.

Indeed, the Court strongly suggested in *Smith v. Robinson* that the mere existence of a judicial right of action under the EHA would not itself be enough to foreclose a § 1983 action. The Court explicitly noted that a procedural EHA claim might be maintainable under § 1983 even if it could also be brought directly under the statute, because such a procedural challenge would not involve evasion of the EHA's administrative remedial scheme. *Id.* at 1014 n.17. The Court's dis-

cussion of this point emphasizes that it was not the EHA's judicial remedies alone that the Court deemed comprehensive, but rather its integrated administrative-judicial remedial scheme.

Of course, the absence of a private right of action is important in concluding that a statute *does not* contain a sufficiently comprehensive enforcement scheme. This Court has stated that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests." *Blessing*, 520 U.S. at 347 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). Thus, the Court has not found enforcement schemes that did not contain private rights of action to be "comprehensive." *See, e.g.*, *Blessing*, 520 U.S. at 348 (concluding that statute that contained no private remedy was not comprehensive enough to foreclose reliance on § 1983); *Wright*, 479 U.S. at 427-29 (finding no congressional intent to preclude § 1983 where the only private remedy contained in the statute at issue was access to local grievance procedures). That a judicial right of action may be *necessary* for a statutory scheme to be comprehensive enough to close the door on § 1983 liability, however, does not mean that it is *sufficient* to do so.

This Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), also suggests that a statutory right of action, on its own, is not sufficient to preclude a § 1983 remedy. There, the Court noted, in holding that the Family Educational Rights and Privacy Act of 1974 (FERPA) did not create a personal right that could be enforced through § 1983, that its "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Gonzaga*, 536 U.S. at 283. In other words, *Gonzaga* suggested that if a statute did not support its own right of action, it was less likely to support a § 1983 action. *Gonzaga* also pointed to the *absence* of a private right of action among the statutory enforcement mechanisms for FERPA as

further support for its holding that the statute at issue created no private rights enforceable under § 1983. *Id.* at 289. In light of *Gonzaga*, a holding that § 1983 is also unavailable whenever a statute *does* contain its own right of action would leave little or nothing of the *Maine v. Thiboutot* presumption that, as its plain text states, § 1983 is available to redress federal statutory violations.

If a private judicial right of action automatically supplanted § 1983, § 1983 would only apply in the small category of cases in which the statute at issue passed the first part of the test for determining whether there is an implied right of action — whether the statute demonstrates Congress's intent to create an enforceable right — but failed the second part of the test — whether the statute demonstrates Congress's intent to create a judicial remedy for that right. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (describing the task in determining whether there is an implied right of action as discerning whether the statute displays congressional "intent to create not just a private right but also a private remedy"). It would be paradoxical, however, to determine that a § 1983 remedy is not available in cases in which Congress has made clear that it intended for there to be a private remedy to enforce the right, but is available in cases in which Congress has not made that intent clear.

III. AN ENFORCEMENT SCHEME PRECLUDES RELIANCE ON § 1983 ONLY IF IT IS INCOMPATIBLE WITH THE § 1983 REMEDY.

The basic principle animating this Court's decisions on the use of § 1983 to enforce statutory rights is that congressional intent to displace § 1983 may be inferred when a § 1983 remedy would be "'inconsistent with Congress' carefully tailored scheme.'" *Blessing*, 520 U.S. at 346 (quoting *Golden State Transit Corp.*, 493 U.S. at 107). The fundamental test for whether a statute's enforcement scheme supplants § 1983 is not whether it contains some means of enforcing the rights created by the statute, but whether § 1983 is some-

how incompatible with that means. *See Blessing*, 520 U.S. at 341 (explaining that Congress can supplant § 1983 either expressly or "by creating a comprehensive enforcement scheme that is *incompatible* with individual enforcement under § 1983") (emphasis added).

Thus, in *Smith v. Robinson*, this Court found the EHA's enforcement scheme to be sufficiently comprehensive because it could not reconcile the ability of parties to go straight to court under § 1983 with the detailed administrative procedure established under the EHA. Allowing a plaintiff to go straight to court, the Court noted, would "render superfluous most of the detailed procedural protections outlined in the statute," and "run counter" to Congress's desire for extensive interactions between parents and local education agencies. *Smith*, 468 U.S. at 1011-12. *Id.* at 1012. Similarly, in *Sea Clammers*, the statute at issue not only limited the remedies available in citizen suits, but also placed various other limitations on such suits, requiring plaintiffs, for example, to give notice to the EPA, state, and alleged violator at least sixty days before filing suit. *Sea Clammers*, 453 U.S. at 6. A party who went straight to court seeking damages under § 1983 would bypass those limitations.

In contrast, an aggrieved party who seeks to enforce § 332(c)(7)(B) through § 1983 is not evading any requirements established by Congress. The principal method for enforcing § 332(c)(7)(B), provided expressly by the statute itself, is a private right of action. When there are no special prerequisites to a statutory private right of action and no express limits on the remedies available, there is absolutely nothing incompatible about allowing a § 1983 action to be brought in tandem with the statutory right of action. Doing so does not allow a plaintiff to bypass congressional limitations or undermine congressional intent.

Maine v. Thiboutot, in which this Court established that § 1983 applied to claims based on statutory violations, confirms that § 1983 rights of action are not incompatible with

other private rights of action. In *Thiboutot*, the plaintiffs had a private right of action under Maine state law to appeal the Department of Human Services' reduction of their welfare benefits. 448 U.S. at 3. Nonetheless, the Court found that they could also obtain relief under § 1983. Though the existing right of action was created through state law, and the Court therefore did not need to consider the issue of congressional intent in creating that right of action, the Court's decision shows that § 1983 and other private rights of action can coexist peacefully.

Here, both the § 1983 and § 332(c)(7)(B) claims permit the plaintiff to go to the same court, under the same circumstances, and argue the same facts and law. The only potential difference between the two rights of action is the possible remedies, yet Congress did not expressly limit the remedies available under § 332(c)(7)(B). Under these circumstances, the rights of action in § 1983 and in § 332(c)(7)(B) cannot be considered so incompatible that the Court must infer that Congress intended to preclude plaintiffs from turning to § 1983 for remedies.

The petitioners and the Solicitor General contend, however, that § 1983 is inconsistent with the § 332(c)(7)(B) right of action in two principal respects: First, they argue, attorneys' fees under 42 U.S.C. § 1988 are available in a § 1983 action, but are not provided under § 332(c)(7)(B); and second, § 332(c)(7)(B)(v) establishes a very short 30-day statute of limitations, which, they argue, would not apply to a § 1983 action brought to enforce rights under § 332(c)(7)(B). The first of these points is factually correct, but fails to establish incompatibility of the two remedies. The second is just wrong: Under 28 U.S.C. § 1658(a), the 30-day limitations period provided by law for claims under § 332(c)(7)(B) is fully applicable to a § 1983 action asserting such claims as well.

With respect to attorneys' fees, it is of course correct that under the "American Rule," attorneys' fees are generally not

available unless a statute expressly provides for them, and § 332(c)(7)(B)(v) does not provide for attorneys' fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). It is equally true that if § 1983 is available to enforce § 332(c)(7)(B), a prevailing party may be eligible for fees under 42 U.S.C. § 1988. *Maine v. Thiboutot*, 448 U.S. at 8-11. But that does not make the two remedies "incompatible," nor does it mean that Congress could not have intended a § 1983 remedy to be available.

Whenever a party attempts to use § 1983 to enforce a statutory right, that is because § 1983 provides something that the statutory remedies by themselves do not. Otherwise, resort to § 1983 would be superfluous. In many instances, of course, that "something" is attorneys' fees. To hold that § 1983 is unavailable whenever it provides for attorneys' fees (or anything else that Congress did not expressly provide in the underlying statute) would render *Maine v. Thiboutot* meaningless by limiting § 1983's availability to cases in which it is unnecessary.

Thus, Congress's silence about attorneys' fees in § 332(c)(7)(B) means only that Congress did not provide for that remedy in a direct action under the statute. It says nothing at all about whether Congress intended to foreclose the availability of fees through the otherwise applicable remedy for a violation of federal statutory rights — § 1983.

As for the statute of iimitations, this case falls within an exception to the general proposition that statutes of limitations for § 1983 claims are borrowed from state law. Under 28 U.S.C. § 1658(a), that principle is inapplicable to cases in which § 1983 is used to enforce rights first created by statutes enacted after December 1, 1990. Section 1658(a) provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." In *Jones v. R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836 (2004), this Court held that a claim

arises under a statute enacted after December 1, 1990, if the claim "was made possible by a post-1990 enactment" — even if the cause of action is brought under a statute, such as 42 U.S.C. § 1981 or § 1983, that long predates 1990. *Id.* at 1845. The claim in this case arises under a provision of the Telecommunications Act enacted in 1996, and § 1658(a) therefore applies.

That does not mean, however, that the statute of limitations applicable to a § 1983 claim is four years. Section 1658(a) provides for a four-year limitations period only if there is no limitations period "otherwise provided by law." Here, the law under which the claim arises for purposes of § 1658(a) specifies that the claim is subject to a 30-day limitations period. Thus, the four-year limitations period is inapplicable, and the statute of limitations for the claim, whether brought directly under the statute itself or under § 1983, is 30 days.[3] Because of the applicability of § 1658(a), there is no danger that the availability of an action under § 1983 will permit litigants to circumvent the limitations period otherwise provided by law for claims under § 332(c)(7)(B). Consequently, there is nothing incompatible about the statutory remedy and the § 1983 remedy, and thus no basis for inferring congressional intent to eliminate the latter.

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[3] *Cf. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991) ("[W]here, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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